TEXAS REGISTER

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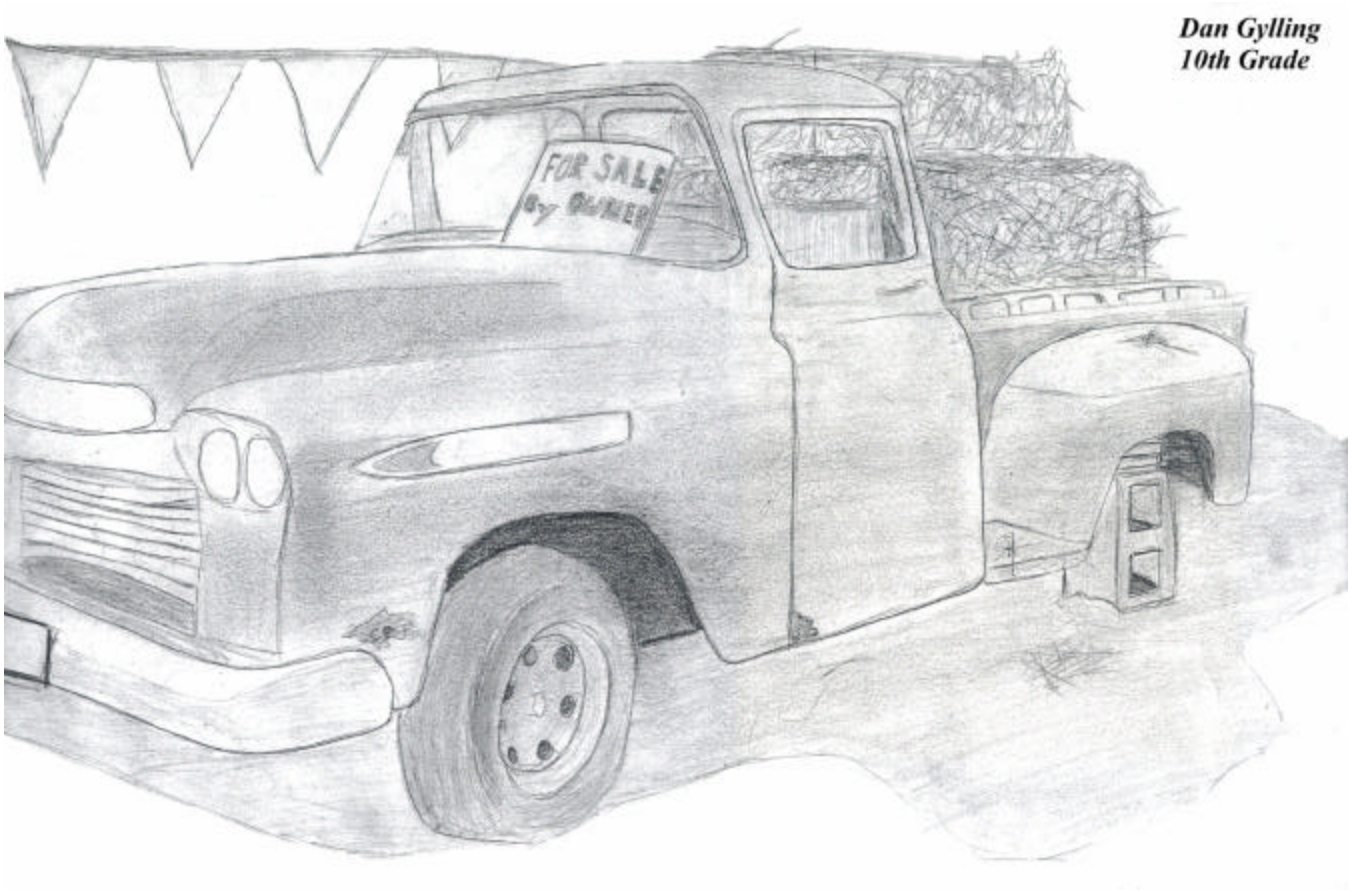

Dan Gylling
10th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Stephen F. Austin State University

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0522-GA

Requestor:

The Honorable Shelia Bailey Taylor

Chief Administrative Law Judge

State Office of Administrative Hearings

Post Office Box 13025

Austin, Texas 78711-3025

Re: Whether the State Office of Administrative Hearings is required to furnish a free transcript to an indigent for purposes of appealing a decision in a driver's license suspension matter

Briefs requested by September 21, 2006

RQ-0523-GA

Requestor:

The Honorable Carole Keeton Strayhorn

Comptroller of Public Accounts

Post Office Box 13528

Austin, Texas 78711-3528

Re: Applicability of section 103.001(b), Texas Civil Practice and Remedies Code, to a claim filed by one of the "Tulia defendants"

Briefs requested by September 25, 2006

RQ-0524-GA

Requestor:

Mr. Ronald Ensweiler, President

State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments

1100 West 49th Street

Austin, Texas 78756-3183

Re: Constitutionality of section 402.451(a) of the Occupations Code, which prohibits the fitting and dispensing of hearing instruments by an unlicensed individual

Briefs requested by September 25, 2006

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200604864
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 29, 2006

♦ ♦ ♦

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts adopts on an emergency basis the repeal and replacement of §35.1 and §35.2, concerning A Guide to Operations, Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes the repeal and replacement of §35.1 and §35.2 for permanent adoption.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended August 2006.

These sections are adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

13 TAC §35.1, §35.2

(Editor's note: The text of the following sections adopted for repeal on an emergency basis will not be published. The sections may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.1. A Guide to Operations.

§35.2. A Guide to Programs and Services.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604755
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective Date: August 25, 2006
Expiration Date: December 22, 2006
For further information, please call: (512) 936-6564

♦ ♦ ♦

13 TAC §35.1, §35.2

The new sections are adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.1. A Guide to Operations.

The commission adopts by reference A Guide to Operations (revised August 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

§35.2. A Guide to Programs and Services.

The commission adopts by reference A Guide to Programs and Services (revised August 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604756
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective Date: August 25, 2006
Expiration Date: December 22, 2006
For further information, please call: (512) 936-6564

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER D. VOTING SYSTEM CERTIFICATION

The Office of the Secretary of State, Elections Division, proposes to repeal and replace §81.60, concerning voting system examinations to require vendors to submit change logs with the application for certification of previously-certified voting system. The repeal is necessary for the proposal of a new §81.60, which will incorporate the most recent requirements to certify voting systems.

The proposed new rule contains all current requirements for certification or modification of a voting system in Texas, including the requirement that applicants include a summary report from a Nationally Recognized Test Laboratory declaring that the item meets the Federal Election Commission's minimum voting system requirements.

Ann McGeehan, Director of Elections, has determined that for the first five-year period that the repeal and new rule are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Ms. McGeehan has also determined that for each year of the first five years that the repeal and the new rule are in effect the public benefit anticipated as a result of enforcing the proposal will be to enhance public confidence in the accuracy and security of electronic voting systems by requiring the systems to meet the more stringent testing standards promulgated by the FEC. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Written comments received before 12:00 noon, Friday, October 6, 2006, will be considered in the final adoption of the rule. Submit comments to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

1 TAC §81.60

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Election Code, §31.003, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election law.

The Texas Election Code, Chapter 122, is affected by this proposed repeal.

§81.60. Voting System Certification Procedures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604718
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-9871

♦ ♦ ♦

1 TAC §81.60

The new rule is proposed under the Texas Election Code (the "Code"), Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code, and under the Code, Chapter 122, §122.032(b), which authorizes the Secretary of State to prescribe additional standards for voting systems.

The Code, Chapter 122, is affected by this proposed new rule.

§81.60. Voting System Certification Procedures.

In addition to the procedures prescribed by the Texas Election Code, Chapter 122, compliance with the following procedures is required for certification of a voting system.

(1) The entity applying for certification must deliver seven copies of their completed application forms (Form 100, Form 101, and if applicable, Form 100 Schedule A,), user operating and maintenance manuals, training material, ITA (Independent Testing Authority) reports, and a change log detailing changes from any previously certified system or component, to the Secretary of State no later than 45 days prior to examination. Six of the seven copies can be in electronic form. One copy must be in hard-copy format organized in binders with tabs and tables of contents.

Figure 1: 1 TAC §81.60(1)
Figure 2: 1 TAC §81.60(1)

Figure 3: 1 TAC §81.60(1)

(2) The applicant must have the ITA deliver four copies of all nationally qualified software/firmware and source codes for the system and/or system components requested for Texas certification, directly to the Secretary of State no later than 45 days prior to examination.

(3) The applicant must deliver all the applicable software/firmware to the National Software Reference Library (NSRL).

(4) The certification fee for a new election management system, tabulation device, electronic ballot marker, and other complex components of a system is $3,000 each and must be received by the Secretary of State 45 days prior to examination. The certification fee for a modification of a voting system shall be determined by the Secretary of State according to the complexity of the modification, and must be received by the Secretary of State 45 days prior to the examination.

(5) Certification examinations will be scheduled by the Secretary of State three times a year during the months of January, May, and August, unless extenuating circumstances provide otherwise.

(6) The time and date of each examination will not be scheduled until after the entity applying for certification has delivered all required documentation and fees to the Secretary of State.

(7) All physical examinations of voting systems will take place at the Office of the Secretary of State, Elections Division, in Austin, unless extenuating circumstances provide otherwise.

(8) The applicant must demonstrate a build of their voting system by using the Secretary of State's copy of the software/firmware received from the ITA prior to the examination.

(9) The applicant shall furnish a sufficient number of sample ballots, designed from the templates provided by the Secretary of State, at least one week prior to the examination.

(10) Each examiner must submit a written report to the Secretary of State stating his or her findings for each voting system no later than the 30th day after examination. Each examiner report shall be posted on the Secretary of State's website.

(11) An examiner appointed by the Secretary of State will be compensated after he or she files his or her written report.

(12) The Secretary of State must approve or disapprove the voting system(s) within 30 days of the required public hearing, unless there are extenuating circumstances.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604719
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-9871

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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts proposes the repeal and replacement of §35.1 and §35.2, concerning A Guide to Operations, Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts the repeal and replacement of §35.1 and §35.2 on an emergency basis.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended August 2006.

Mary Beck, Director of Finance and Administration, Texas Commission on the Arts, has determined that for the first five-year period the repeal and new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the repeal and new sections as proposed.

Ms. Beck also has determined that for each year of the first five years the repeal and new sections are in effect the public benefit anticipated as a result of enforcing the repeal and new sections will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There is no anticipated economic cost to persons who are required to comply with the repeal and new sections as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Jim Bob McMillan, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

13 TAC §35.1, §35.2

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§35.1. A Guide to Operations.

§35.2. A Guide to Programs and Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604757
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 936-6564

♦ ♦ ♦

13 TAC §35.1, §35.2

The new sections are proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts

with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§35.1. A Guide to Operations.
The commission adopts by reference A Guide to Operations (revised August 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

§35.2. A Guide to Programs and Services.
The commission adopts by reference A Guide to Programs and Services (revised August 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604758
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 936-6564

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

16 TAC §25.174

The Public Utility Commission of Texas (commission) proposes new §25.174, relating to Competitive Renewable Energy Zones. The proposed new rule will implement Senate Bill 20, 79th Legislature, 1st Called Session (2005), which amended Public Utility Regulatory Act (PURA) §39.904, relating to the Goal for Renewable Energy. The new §25.174 will provide procedures for the establishment of Competitive Renewable Energy Zones (CREZs) to facilitate delivering to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in Texas. This new rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 31852 is assigned to this proceeding.

PURA directs the commission to consider the level of financial commitment by generators when designating CREZs. Under the new section, financial commitment may be demonstrated by existing development, by signed interconnection agreements with transmission owners, by executed leasing agreements with landowners, or by making deposits for the purchase of congestion revenue rights (CRRs) in the event that an area becomes a CREZ.

In addition to comments on various provisions of the proposed rule, the commission requests comment on the following questions.

1. *Financial commitments by generators*. Proposed subsection (b)(4)(A) allows generators to indicate interest in a potential CREZ by posting non-refundable deposits of different amounts at different stages. Are the amounts large enough to indicate a sufficient degree of commitment by a generator to assist the commission in designating CREZs and granting certificates of convenience and necessity for transmission lines related to CREZs? If not, how large should the requirement be?

2. *Prioritization of dispatch*. Subsection (b)(4) provides for assigning dispatch priority to renewable generators located in a CREZ if they fulfill all financial requirements arising from that paragraph. Please explain why this provision is better or worse than subsection (b)(3), which uses deposits reserved for the future purchase of congestion revenue rights. In particular, please comment on each alternative's consistency with PURA Chapter 35 and ERCOT protocols.

3. *Timeliness of completing upgrades*. Subsection (a)(5)(E) provides that in its final CREZ order, the commission may impose reporting requirements and other measures to ensure timely completion of CCN applications and construction upgrades. What specific measures would be appropriate for the commission to consider in a final order, and should they be specified in this rule?

4. *Length of process*. The proposed rule establishes deadlines for a final CREZ order, and for utilities to file a CCN application. Please identify steps in the CREZ process that can be shortened or consolidated.

Dr. David Hurlbut, Senior Economist, Electric Industry Oversight Division, has determined that for each year of the first five-year period the proposed new section is in effect there will be no fiscal implications for state government as a result of enforcing or administering the new section. Recent wind power development in West Texas indicates there will be significant fiscal implications for local governments where CREZs are to be located. The value of local property tax bases grew significantly as a result of wind power development, and similar growth would be expected to occur in any area designated by the commission as a CREZ.

Dr. Hurlbut has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be to increase the amount of electricity delivered to customers using renewable generation resources in Texas, consistent with the goals that have been established in state law. The specific benefits include increasing the state's use of a cost-free fuel source, reducing the use of generation technologies that result in air emissions, and diversifying the state's electric generating resource portfolio.

There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There may be economic costs to persons who are required to comply with the proposed section. The cost of additional transmission related to CREZ development will increase transmission costs borne by customers. However, it is expected that the benefits

accruing from implementation of the proposed section will outweigh the costs, and that the section will achieve the Legislative goals with the least cost to consumers.

Dr. Hurlbut has also determined that for each year of the first five years the proposed section is in effect, certain local economies are likely to experience temporary employment growth and some additional permanent jobs. The commission's designation of CREZs will indicate the counties where future growth in renewable energy development is most likely to take place. Construction of new wind-powered generation facilities is expected to accelerate as developers try to take advantage of the federal Production Tax Credit before it expires on December 31, 2007. During this period, transmission construction may also stimulate temporary job growth.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Thursday, October 12, 2006, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 25 days after publication. Sixteen copies of comments to the proposed section are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 38 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31852.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 39.101(b)(3), and 39.904 (Vernon 1998 & Supplement 2006) (PURA). Section 14.001 provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §39.101(b)(3) provides that a customer is entitled to have access to providers of energy generated by renewable energy resources; and §39.904, provides the commission the power to adopt rules necessary to administer and enforce the programs to promote the development of renewable energy technologies.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101, and 39.904.

§25.174. Competitive Renewable Energy Zones.

(a) Designation of competitive renewable energy zones. The designation of Competitive Renewable Energy Zones (CREZs) pursuant to Public Utility Regulatory Act (PURA) §39.904(g) shall be made through a contested-case proceeding initiated by commission staff, for which the commission shall establish a procedural schedule. The commission shall consider the need for proceedings to determine CREZs in 2006 and in subsequent years as deemed necessary by the commission.

(1) Commission staff shall initiate a contested case proceeding within five working days of receiving the information required by paragraph (2) of this subsection. Any interested entity that participates in the contested case may nominate a region for CREZ designation. An entity may submit any evidence it deems appropriate in support of its nomination, but it shall include information prescribed in paragraph (2)(A) - (C) of this subsection.

(2) By December 1, 2006, the Electric Reliability Council of Texas (ERCOT) shall provide to the commission a study of the wind energy production potential statewide, and of the transmission constraints that are most likely to limit the deliverability of electricity from wind energy resources. ERCOT may consult with other regional transmission organizations, independent organizations, independent system operators, or utilities in its analysis of regions of Texas outside the ERCOT power region. At a minimum, the study submitted by ERCOT shall include:

(A) A map and geographic descriptions of regions that can reasonably accommodate at least 1,000 MW of new wind-powered generation resources;

(B) An estimate of the generating capacity in megawatts (MW) and annual production potential in megawatt-hours (MWh) that may be reasonably expected for each region;

(C) A description of the transmission system upgrades necessary to provide transmission service to the region, a preliminary estimate of the cost, and identification of the utility or utilities whose existing transmission facilities would be directly affected;

(D) An analysis of potential zone combinations;

(E) An estimate of the additional ancillary service capacity required to maintain system reliability; and

(F) The amount of wind-powered generating capacity already in service in the zone, the amount not in service but for which interconnection agreements have been signed, and the amount under study but for which no interconnection agreements have been signed.

(3) The Texas Department of Parks and Wildlife may provide an analysis of wildlife habitat that may be affected by renewable energy development in any candidate zone, and may submit recommendations for mitigating harmful impacts on wildlife and habitat.

(4) In determining whether to designate an area as a CREZ and the number of CREZs to designate, the commission shall consider:

(A) whether renewable energy resources and suitable land areas are sufficient to develop generating capacity from renewable energy technologies;

(B) the cost of constructing transmission capacity necessary to deliver to electric customers the electric output from renewable energy resources in the candidate zone;

(C) the benefits of renewable energy produced in the candidate zone;

(D) the level of financial commitment by developers of renewable energy resources; and

(E) any other factors considered appropriate by the commission as provided by PURA.

(5) The commission shall issue a final order within six months of the initiation by commission staff of a CREZ proceeding, unless it finds good cause to extend the deadline. For each new CREZ it orders, the commission shall specify:

(A) locations where renewable energy resources may connect to CREZ transmission facilities;

(B) any necessary transmission upgrades inside the CREZ;

(C) the minimum generating capacity from renewable energy resources that the CREZ may accommodate and, if appropriate, the maximum generating capacity from renewable energy resources that the CREZ may accommodate;

(D) any necessary transmission upgrades outside the CREZ;

(E) the entities responsible for the transmission upgrades, and any reporting requirements and other appropriate measures to ensure that the entities complete the ordered upgrades in a timely manner; and

(F) any other requirement considered appropriate by the commission.

(b) Level of financial commitment by generators.

(1) A renewable energy developer's existing renewable energy resources, signed interconnection agreements for planned renewable energy resources, and executed leasing agreements with landowners in a proposed CREZ are examples of indications of financial commitment by developers to the CREZ.

(2) A non-utility entity's commitment to build and own transmission facilities dedicated to delivering the output of renewable energy resources in a proposed CREZ to the transmission system of an electric utility or a transmission utility in Texas or a deposit or payment to secure or fund the construction of such transmission facilities by an electric utility or a transmission utility to deliver the output of a renewable generation project in Texas is an indication of the entity's financial commitment to the CREZ.

(3) To demonstrate a financial commitment for an area as a proposed CREZ for which transmission service would be provided by an ERCOT utility, a developer may deposit funds with ERCOT toward the future purchase of congestion revenue rights (CRRs) that would be created in the event that the commission selects that region as a CREZ.

(A) After the commission establishes the date for a proceeding to determine CREZs, ERCOT shall conduct an open season of not less than 60 days for accepting deposits for the purchase of CRRs. After the close of the open season, ERCOT shall report to the commission the total deposits for each candidate zone. A developer of renewable energy resources submitting a deposit shall specify a potential CREZ or a county, and shall state the developer's anticipated development level in megawatts of renewable energy capacity.

(B) Deposited amounts, including accrued interest, may be applied towards the purchase of point-to-point CRRs for the export of electricity from a renewable energy resource in the CREZ for which the funds were deposited, and shall be used for no other purpose. CRRs may be of any type and any duration, as long as the source point for the CRR is a renewable energy resource in the CREZ. Ownership of an account is transferable, but the deposits are not refundable except as provided in subparagraph (E) of this paragraph.

(C) A deposit pursuant to this paragraph does not entitle the developer to any CRRs. A developer making a deposit shall comply with all requirements set forth in the ERCOT protocols in order to purchase CRRs.

(D) A two-year CRR for a CREZ shall convert to a six-year CRR if the CRR is purchased with funds deposited pursuant to this paragraph, and if the deposit specified the CREZ included in the area served by the CREZ.

(E) Any funds deposited pursuant to this paragraph shall be refunded to the developer making the deposit with accrued interest if the commission does not designate the associated region as a CREZ once the proceeding to determine CREZs is completed or the commission notifies the utilities that are identified to construct transmission facilities related to a CREZ to discontinue planning related to filing an application for a certificate of convenience and necessity for such transmission facilities. The commission shall order a refund upon demonstration by the developer that it has completed construction of renewable energy resources in the CREZ at or in excess of the anticipated development level specified at the time the deposit was made.

(4) In addition to the financial commitments reflected in paragraphs (1) - (3) of this subsection, a renewable energy developer may commit to a progressive financial commitment (PFC) schedule of potentially three stages of progressively increasing deposits of money to demonstrate interest in developing a specific quantity of renewable generation capacity associated with a specific candidate CREZ. Renewable energy capacity that completes a PFC schedule and is placed in commercial operation will receive a dispatch priority for operating in the CREZ to be specified in the CREZ determination order. All PFC deposits will be made to ERCOT. The commission will order a refund of Stage Two and Stage Three PFC deposits in the event the candidate CREZ is not designated as a CREZ, the certificates of convenience and necessity applications relating to a CREZ are denied, the developer's project is limited pursuant to subsection (d)(3) of this section, or after the developer has completed construction of renewable energy resources in the CREZ in proportion to the MW of commercial renewable resource to which they are assigned.

(A) Stage One PFC deposits of $100 per MW of interest will be made in any open season conducted pursuant to paragraph (3)(A) of this subsection. Stage One PFC deposits received from wind developers are non-refundable and will be used to support studies as directed by the commission of technical, economic, environmental and customer-related issues relevant to wind power development.

(B) Stage Two PFC additional deposits of $2,000 per MW of interest, limited to the MW of interest established by each developer in its Stage One PFC deposit, will be made in any open season conducted pursuant to subsection (d)(1) of this section.

(C) Stage three PFC additional deposits of $4,000 per MW of construction commitment interest, limited to the MW of interest established by each developer in its Stage Two PFC deposits, will be made in any open season conducted pursuant to subsection (d)(4) of this section.

(c) Plan to develop transmission capacity.

(1) No later than one year after an order by the commission designating a CREZ, the utility or utilities providing transmission service in or to a CREZ shall file applications for all required certificates of convenience and necessity (CCNs) for transmission facilities identified by the commission in accordance with subsection (a)(5)(B) and (D) of this section that are necessary to deliver to electric customers the electric output from renewable energy technologies in the CREZ, subject to the provisions of subsection (d) of this section. The commission may allow additional time for a utility to file an application upon a showing of good cause by the utility. The commission may establish a filing schedule if a CREZ order requires numerous CCN applications.

(2) A CCN application for a transmission project intended to serve a CREZ need not address the criteria in PURA §37.056(c)(1) and (2), except as provided in subsection (d)(4) of this section.

(3) If an ERCOT utility receives a request to connect a non-renewable generation facility to transmission facilities approved under this section, the utility shall presume for the purpose of planning that the CREZ transmission facilities are fully utilized by renewable generation facilities. Transmission service to new non-renewable generation facilities provided by an ERCOT utility shall be in addition to any CREZ transmission facilities ordered under this section, and shall be governed by §§25.191 - 25.203 of this title (relating to Open-Access Transmission Service within the Electric Reliability Council of Texas).

(d) Requests for transmission service from ERCOT utilities.

(1) As part of, or following the issuance of an order determining a CREZ for which transmission service would be provided by an ERCOT utility, the commission may establish an open season for developers of renewable energy facilities to request transmission service from points within the CREZ. To request transmission service under this paragraph, the developer shall notify the commission of its request, specifying the level in megawatts of renewable capacity and location of generation and transmission facilities it plans to construct and demonstrate that it has initiated the process for requesting such service by complying with §25.198(c)(1) of this title (relating to Initiating Transmission Service).

(2) If at the end of the open season the aggregate level of renewable energy for which transmission service is requested for a CREZ exceeds the minimum level of renewable capacity specified in the CREZ order, the commission shall notify the utilities identified to provide the transmission service to proceed with planning for the filing of the CCN application related to the additional facilities needed to provide the transmission service. If the aggregate level of renewable energy for which transmission service is requested for a CREZ does not equal or exceed the minimum level of renewable capacity specified in the CREZ order, the commission may notify the utilities identified to provide the transmission service to discontinue the planning related to the filing of the CCN application and not to file the application.

(3) If the aggregate level of renewable energy for which transmission service is requested for a CREZ exceeds the maximum level of renewable capacity specified in the CREZ order, the commission may initiate a proceeding to limit interconnection to the transmission system in the CREZ to a level of renewable resources that is not in excess of the maximum and to identify the developers whose projects may interconnect to the transmission system in the CREZ. Priority in interconnecting to the transmission system shall be based on financial commitments of the developers, in accordance with subsection (b) of this section. In determining such priority, the commission may also consider the progress that a developer has made in obtaining the transmission studies required for a new generator interconnection as indications of financial commitment.

(4) During the CCN proceeding for the approval of transmission facilities to provide transmission service from a CREZ, the commission may establish an open season for developers of renewable energy facilities to request interconnection agreements for transmission service from points within the CREZ. A developer that requests an interconnection agreement shall comply with the deposit requirement in §25.195(c) of this title (relating to Terms and Conditions for Transmission Service). If the aggregate level of renewable energy for which interconnection agreements are requested for a CREZ does not equal or exceed the minimum level of renewable capacity specified in the CREZ order, the commission may deny the CCN application on the basis that there is not a need for the facilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604742
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

16 TAC §59.3

The Texas Department of Licensing and Regulation ("Department") proposes an amendment to 16 Texas Administrative Code §59.3 regarding the continuing education requirements.

Texas Occupations Code, §51.405 requires the Texas Commission of Licensing and Regulation ("Commission") to recognize, prepare, or administer continuing education programs for license holders. In response to this legislative mandate, the Commission has adopted rules at 16 TAC Chapter 59, to establish general requirements for continuing education providers and courses. The chapter contains rules of general applicability that currently apply to air conditioning and refrigeration contractors; auctioneers and associate auctioneers; cosmetologists; electricians; licensed court interpreters; property tax consultants; and registered accessibility specialists. The amendments to §59.3 add water well drillers and pump installers, and apprentices to the coverage of Chapter 59. This amendment will allow for providers of continuing education for this program to register with the Department and, once a specific continuing education rule is in place for the particular program, obtain approval for courses. The provisions of Chapter 59, including fee provisions, would apply to those programs. Continuing education requirements that are specific to the water well drillers and pump installers program will be contained in the rules for the program.

This rule amendment is necessary to implement Texas Occupations Code, §51.405 with respect to the water well drillers and pump installers program.

William H. Kuntz, Jr., Executive Director, has determined that, for the first five-year period the proposed amendment is in effect, there will be additional costs to the Department from enforcing and administering the rule and additional revenue generated from new fees. Because the number of potential continuing education providers is unknown, the Department is unable to estimate the additional costs or revenue. It is anticipated that there will be no net fiscal impact to state government because revenue from new fees should be sufficient to cover additional costs. There will be no cost to local government as a result of enforcing or administering the amended rule.

Mr. Kuntz also has determined that, for each year of the first five-year period the amendment is in effect, the public benefit will be that continuing education taken by license holders will be subject

to minimum standards. The public will benefit from standards that serve to increase or maintain the skills and competence of license holders, who in turn provide services to the public.

The probable economic costs to persons required to comply with the proposed rule and the effect on small or micro-businesses would be the following. Providers would be required to pay $250 annually, for each occupation for which the provider offers continuing education. For each course, the provider would be required to pay $100 annually, for each occupation to which the course is offered for continuing education credit. The total cost to a particular provider would depend on the number of courses offered and the number of occupations served by that provider. In addition, a provider would be charged $25 for a revised or duplicate registration.

A provider may incur some costs in furnishing copies of course materials to the Department as part of the course approval application. This cost would depend on the amount and dollar value of materials involved, which would vary by course.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: caroline.jackson@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendment is proposed under Texas Occupations Code, Chapters 51, 1901, and 1902, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. In particular, §51.405 requires the Commission to recognize, prepare, or administer continuing education programs for license holders.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51, 1901, and 1902. No other statutes, articles, or codes are affected by the proposal.

§59.3. Purpose and Applicability.

These rules are promulgated to establish continuing education provider and course requirements for the following occupations regulated by the Department of Licensing and Regulation:

(1) - (7) (No change.)

(8) Water well drillers, pump installers and apprentices, as provided by Texas Occupations Code, Chapters 1901 and 1902. Additional continuing education requirements relating to water well drillers, pump installers, and apprentices may be found in Chapter 76 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604794
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-7348

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CHAPTER 76. WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code ("TAC"), §§76.10, 76.204 - 76.206, 76.1000, 76.1004, 76.1005; new §76.250; and the repeal of §76.220 and §76.910, regarding the water well drillers and water well pump installers program.

These proposed rule changes are necessary to update statutory references and conform rule requirements to current law. In addition, the rule changes are needed to reorganize certain provisions for greater clarity and readability and to delete unnecessary provisions. A new continuing education rule is added to make continuing education requirements consistent with 16 TAC Chapter 59, which contains the Department's general rules for continuing education and continuing education providers and courses.

Section 76.10(17) and (18) are proposed for deletion because the definitions of "continuing education" and "continuing education program" are no longer needed with the conversion of the water well driller and pump installer continuing education program to 16 TAC Chapter 59. All of the following paragraphs are renumbered. New paragraph (33) is added to make it clear that removal of a water well pump is an operation that must be performed by a licensed water well pump installer.

Section 76.204(b) and former §76.204(f) are amended to delete an unnecessary reference to specific continuing education requirements and to add a cross-reference to new §76.250. A new §76.204(c) is added to make clear the continuing education requirements for apprentices.

Section 76.205 is amended at subsections (b) and (d) to add the word "driller" to all references to pump installers since the rule is intended to address both apprentice drillers and apprentice pump installers. Also, in subsection (d) the phrase "drilling or pump installing" is added to replace the deleted reference to procedures employed in placement and preparation for operations. New subsection (h) is added to require apprentices to have their registrations with them and to show them upon request.

Section 76.206(e) is deleted because continuing education reporting will become electronic and certificates of completion will no longer be submitted to the Department. New subsection (g) is added to allow apprentices to be supervised by qualified licensees when the supervising driller or pump installer is unavailable if the substitute supervising licensee is at the well site or is within one hour's driving time of the well site. New subsection (h) is added to require drillers and pump installers to have their licenses in their possession and to show them upon request.

Section 76.220 is proposed for repeal to allow for new §76.250 regarding continuing education for licensees, registrants, providers, and courses.

Proposed new §76.250 establishes new continuing education requirements for licensees and registrants. Under Texas Occupations Code, §51.405 the Texas Commission of Licensing and Regulation ("Commission") is required to recognize, prepare, or administer continuing education programs for license holders, and a license holder must participate in the programs to the extent required by the Commission to keep the person's license. The new §76.250 is proposed under this statutory provision, and the new rule makes changes to current continuing education requirements in the water well drillers and pump installers pro-

gram. As part of a separate proposed rulemaking, the Department's general requirements for continuing education providers and courses, which are contained in 16 TAC Chapter 59, will apply to providers and courses in the water well drillers and pump installers program. In addition, the proposed new §76.250 establishes requirements that are specific to the water well drillers and pump installers program for licensees, apprentices, providers, and courses. The new rule requires a licensee to complete four hours of continuing education in Department-approved courses to renew a license. The continuing education hours must include one hour of instruction in Texas state law and rules that regulate the conduct of licensees, and three hours of instruction in topics directly related to the water well industry. To renew a registration as an apprentice, a registrant must complete one hour of instruction in Texas state law and rules that relate to the water well driller and pump installer program. The continuing education hours must be completed during the term of the current license or registration or, in the case of a timely renewal, within the one-year period prior to the date of renewal. A licensee or registrant may not receive credit for attending the same course more than once. A licensee or registrant is required to retain a copy of the certificate of completion for one year after the date of completion of the course. To be approved by the Department, a provider's course must cover one or more of the required topics. The rule will apply to license and registration renewals and to providers and courses upon the effective date of the rule.

Section 76.910 is proposed for repeal because it contains provisions that the department complies with based on other statutory requirements.

Section 76.1000 is amended at subsection (b)(5) to require that closed loop geothermal wells have the top 10 feet of the annular space filled with impervious bentonite or similar material, as opposed to the current requirement that the top 30 feet be so filled. Subsection (c)(2) is amended to add the phrase "steel casing." The amended rule will allow wells to be completed without a surface slab or block when either steel casing or a pitless adapter is used. Subsection (g) is amended by deleting the word "adjacent" in two places and adding the word "any" to make it clear that drill cuttings or spoil may not be spilled onto another person's property without that person's consent rather than limiting the prohibition to adjacent property. New subsection (m) is added to prohibit the use of pump column material that has been used in the production of oil or gas that has been contaminated with substances that may not be placed in regulated wells.

Section 76.1004 is amended by adding to subsection (a) a requirement that wells also be capped and plugged in compliance with local ground water conservation district rules or applicable city ordinances. Subsection (a)(4) is amended by adding provisions prohibiting use of bentonite grout as a plugging material if a water zone contains chlorides above 1500 parts per million or if hydro carbons are present. Subsection (b) is amended by deleting the phrase "leave mounded" and replacing it with language to make it more clear that backfill material should be mounded to compensate for settling. Subsection (c) is amended to delete requirements that the top two feet of wells that are dry holes be plugged with cement and language is added to require mounding of backfill material as in subsection (b) stated above.

Section 76.1005(a)(6) is amended by deleting the phrases "close proximity to a potential" and "could negatively affect groundwater" to remove non-specific references. Now water wells drilled before June 1, 1983 that are within fifty feet of a source of contamination that affects quality of the water produced are subject to plugging or modification requirements ordered by the department.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments, new rule, and repeal are in effect there will be no significant costs to the state. There may be some increased workload for Department staff in reviewing continuing education courses because the review process will be somewhat more rigorous than under current rules. However, any increase in costs to the Department is not expected to be significant, and additional revenue from frees established in 16 TAC Chapter 59 should be sufficient to offset any additional costs. There will be no cost to local government as a result of enforcing or administering the proposed amendments, new rule, and repeal.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments, new rule, and repeal are in effect, the public benefit will be that rule requirements for water well drillers, pump installers, and apprentices will be clearer and better organized. Continuing education taken by licensees and registrants will be subject to minimum standards, consistent with other Department programs. These standards should serve to increase or maintain the skills and competence of licensees and registrants, who in turn provide services to the public.

There will be some economic costs to certain persons who are required to comply with the rule changes, including small or micro-businesses. Fees for continuing education providers will be those stated in 16 TAC Chapter 59. The Departments anticipates that the cost to providers will not be unduly high relative to the benefits to the public and licensees of enforcing standards for continuing education.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: caroline.jackson@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

16 TAC §§76.10, 76.204 - 76.206, 76.250, 76.1000, 76.1004, 76.1005

The amendments and new rules are proposed under Texas Occupations Code, Chapters 51, 1901, and 1902, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the amendments and new rule are those set forth in Texas Occupations Code, Chapters 51, 1901, and 1902. No other statutes, articles, or codes are affected by the proposal.

§76.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (16) (No change.)

~~[(17) Continuing Education--Four (4) hours of education per year required, including one (1) hour dedicated to the Water Well Driller/Pump Installer Statutes and Rules course as a condition of license or registration renewal under the Code and/or Rules.]~~

~~[(18) Continuing Education Program--A formal offering of instruction or information to licensees, registrants, or certificate holders for the purpose of maintaining skills necessary for the protection of~~

~~groundwater and the health and general welfare of the citizens and the competent practice of the construction of water wells, the installation of pumps or pumping equipment or water well monitoring. A school, clinic, forum, lecture, course of study, educational seminar, workshop, conference, convention, or short course approved by the Department, may offer such programs.]~~

(17) [~~(19)~~] Dry litter poultry facility--Fully enclosed poultry operation where wood shavings or similar material is used as litter.

(18) [~~(20)~~] Easy access--Access is not obstructed by other equipment and the fitting can be removed and replaced with a minimum of tools without risk of breakage of the attachment parts.

(19) [~~(21)~~] Edwards aquifer--That portion of an arcuate belt of porous, water bearing, predominantly carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis, Williamson, and Bell Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devil's River Limestone, Person Formation, Kainer Formation, Edwards Formation and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.

(20) [~~(22)~~] Environmental soil boring--An artificial excavation constructed to measure or monitor the quality and quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. The term shall not include any well that is used in conjunction with the production of oil, gas, or any other minerals.

(21) [~~(23)~~] Executive Director--means the executive director of the Department.

(22) [~~(24)~~] Flapper--The clapper, closing, or checking device within the body of the check valve.

(23) [~~(25)~~] Foreign substance--Constituents that includes recirculated tailwater and open-ditch water when a pump discharge pipe is submerged in the ditch.

(24) [~~(26)~~] Freshwater--Water whose bacteriological, physical, and chemical properties are such that it is suitable and feasible for beneficial use.

(25) [~~(27)~~] Granular sodium bentonite--Sized, coarse ground, untreated, sodium based bentonite (montmorillonite) which has the specific characteristic of swelling in freshwater.

(26) [~~(28)~~] Groundwater conservation district--Any district or authority to which Chapter 36, Water Code, applies and that has the authority to regulate the spacing or production of water wells.

(27) [~~(29)~~] Injection well includes:

(A) an air-conditioning return flow well used to return water that has been used for heating or cooling in a heat pump to the aquifer that supplied the water;

(B) a cooling water return flow well used to inject water that has been used for cooling;

(C) a drainage well used to drain surface fluid into a subsurface formation;

(D) a recharge well used to replenish water in an aquifer;

(E) a saltwater intrusion barrier well used to inject water into a freshwater aquifer to prevent the intrusion of salt water into fresh water;

(F) a sand backfill well used to inject a mixture of water and sand, mill tailings, or other solids into subsurface mines;

(G) a subsidence control well used to inject fluids into a non-oil-producing or non-gas-producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water; and

(H) a closed system geothermal well used to circulate water, other fluids, or gases through the earth as a heat source or heat sink.

(28) [~~(30)~~] Irrigation distribution system--A device or combination of devices having a hose, pipe, or other conduit which connects directly to any water well or reservoir connected to the well, through which water or a mixture of water and chemicals is drawn and applied to land. The term does not include any hand held hose sprayer or other similar device, which is constructed so that an interruption in water flow automatically prevents any backflow to the water source.

(29) [~~(31)~~] Monitoring well--An artificial excavation constructed to measure or monitor the quality and/or quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. Included within this definition are environmental soil borings, piezometer wells, observation wells, and recovery wells. The term shall not include any well that is used in conjunction with the production of oil, gas, coal, lignite, or other minerals.

(30) [~~(32)~~] Mud for drilling--A relatively homogenous, viscous fluid produced by the suspension of clay-size particles in water or the additives of bentonite or polymers.

(31) [~~(33)~~] Piezometer--A device so constructed and sealed as to measure hydraulic head at a point in the subsurface.

(32) [~~(34)~~] Piezometer well--A well of a temporary nature constructed to monitor well standards for the purpose of measuring water levels or used for the installation of piezometer resulting in the determination of locations and depths of permanent monitor wells.

(33) Placement and preparation for operation of equipment and materials--Includes but is not limited to removing the pump.

(34) [~~(35)~~] Plugging--An absolute sealing of the well bore.

(35) [~~(36)~~] Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water that renders the water harmful, detrimental, or injurious to humans, animals, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any or reasonable purpose.

(36) [~~(37)~~] Potable water--Water which is safe for human consumption in that it is free from impurities in amounts sufficient to cause disease or harmful physiological effects. For purposes of this chapter, water may be rendered potable by adding chlorine bleach at the rate of one (1) gallon of bleach for every 500 gallons of water.

(37) [~~(38)~~] Public water system--A system supplying water to a number of connections or individuals, as defined by current rules and regulations of the Texas Commission on Environmental Quality, 30 TAC Chapter 290.

(38) [~~(39)~~] Recharge zone--Generally, that area where the stratigraphic units constituting the Edward Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the

Edwards Aquifer. The recharge zone is identified as that area designated as such in official maps in the appropriate regional office of the Texas Commission on Environmental Quality.

(39) [~~(40)~~] Recovery well--A well constructed for the purpose of recovering undesirable groundwater for treatment or removal of contamination.

(40) [~~(41)~~] Sanitary well seal--A watertight device to maintain a junction between the casing and the pump column.

(41) [~~(42)~~] Test well--A well drilled to explore for groundwater.

(42) [~~(43)~~] Undesirable water--Water that is injurious to human health and the environment or water that can cause pollution to land or other waters.

(43) [~~(44)~~] Water or waters in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or non-navigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(44) [~~(45)~~] Well--A water well, test well, injection well, dewatering well, monitoring well, closed loop geothermal well, piezometer well, observation well, or recovery well.

(45) [~~(46)~~] State of Texas Well Report (Well Log)--A log recorded on forms prescribed by the Department, at the time of drilling showing the depth, thickness, character of the different strata penetrated, location of water-bearing strata, depth, size, and character of casing installed, together with any other data or information required by the Executive Director.

§76.204. License and Apprentice Registration Renewal.

(a) On or before the expiration date of the license or registration, the licensee or registrant shall pay an annual renewal fee to the Department and submit an application for renewal.

(b) To renew a license, the licensee is required to show proof of four (4) hours of continuing education in compliance with §76.250(b) [~~with one (1) hour dedicated to the Water Well Driller/Pump Installer Statutes and Rules course~~].

(c) To renew an apprentice registration the registrant is required to show proof of one hour of continuing education in compliance with §76.250(c).

(d) [~~(c)~~] Late renewal fees for licenses and registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(e) [~~(d)~~] A person's registration will not be renewed unless their supervisor's well driller and/or pump installer license is current.

(f) [~~(e)~~] Requests to waive the Continuing Education requirements because the license holder does not supervise, contract with the public, or has retired from the drilling or pump service industry shall:

(1) be submitted in writing to the Department;

(2) contain a detailed explanation of the conditions under which the waiver is requested,

(3) be accompanied by the renewal fee, and

(4) be inactive for a minimum of one (1) year.

(g) [~~(f)~~] To re-instate a driller and/or pump installer license to supervise and/or contract with the public, the driller and/or pump installer must submit four (4) hours of continuing education in compliance with §76.250(b) [~~with one (1) hour dedicated to the Water Well Driller/Pump Installer Statutes and Rules course~~].

§76.205. Registration for Driller and/or Pump Installer Apprenticeship.

(a) (No change.)

(b) A registered driller or pump installer apprentice shall represent his supervising driller or pump installer during operations at the well site.

(c) (No change.)

(d) A registered driller/pump [~~pump~~] installer apprentice may not perform, or offer to perform, any services associated with drilling or pump installing [~~procedures employed in the placement and preparation for operation of equipment and material used to obtain water from a water well~~] except under the direct supervision of a licensed driller/pump [~~pump~~] installer and according to the supervising driller/pump [~~pump~~] installer's express directions. A driller/pump [~~pump~~] installer apprentice's registration may be revoked for engaging in prohibited activities.

(e) - (g) (No change.)

(h) A driller/pump installer apprentice must have the registration issued by the department in his possession at all times and must present the registration upon request.

§76.206. Responsibilities of the Apprentice and Supervising Driller and/or Pump Installer.

(a) - (d) (No change.)

[~~(e) A one (1) hour Certificate of Completion of the Water Well Driller/Pump Installer Statutes and Rules course shall accompany each apprentice registration renewal.~~]

(e) [~~(f)~~] The licensed driller and/or licensed pump installer shall be present at the well site at all times during all operations or may be represented by a registered apprentice capable of immediate communication with the licensed driller or licensed pump installer at all times, provided that the licensed driller and/or licensed pump installer is less than one hour arrival time from the well site. The licensed driller shall visit the well site at least once each day of operation to direct the manner in which the operations are conducted.

(f) [~~(g)~~] The supervising licensed driller and/or licensed pump installer is responsible for compliance with the Texas Occupations Code, Chapters 1901 and 1902 and Department Rules.

(g) If the supervising driller or pump installer is unavailable, he may be represented by another licensed driller or pump installer who:

(1) is employed by the apprentice's employer;

(2) meets the requirements set forth in §76.205; and

(3) is either at the well site or can be at the site within one (1) hour driving time.

(h) A driller and/or pump installer must have the license issued by the department in his possession at all times and must present the license upon request.

[~~(h) If the supervising driller or pump installer is unavailable, he may be represented by any other licensed driller or licensed pump installer employed by the same company who can be at the well site within one (1) hour.~~]

§76.250. Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) To renew a license as a driller or pump installer, a licensee must complete 4 hours of continuing education in courses approved by the department. The continuing education hours must include the following:

(1) one hour of instruction dedicated to the Water Well Driller/Pump Installer statutes and rules; and

(2) three hours of instruction in topics directly related to the water well industry, including but not limited to well and water well pump standards, geologic characteristics of the state, state groundwater laws and related regulations, well construction and pump installation practices and techniques, health and safety, environmental protection, technological advances, or business management.

(c) To renew a registration as an apprentice, a registrant must complete a 1 hour department-approved continuing education course dedicated to the Water Well Driller/Pump Installer statutes and rules.

(d) The continuing education hours must have been completed within the term of the current license or registration, in the case of a timely renewal. For a late renewal, the continuing education hours must have been completed within the one year period immediately prior to the date of renewal.

(e) A licensee or registrant may not receive continuing education credit for attending the same course more than once.

(f) Licensees and registrants shall retain a copy of the certificate of completion for a course for one year after the date of completion. In conducting any inspection or investigation of the licensee, the department may examine the licensee's or registrant's records to determine compliance with this subsection.

(g) To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the topics listed in subsection (b) of this section, and the provider must be registered under Chapter 59 of this title.

(h) Except as provided in subsection (i) of this section, this section shall apply to providers and courses for licensees and registrants upon the effective date of this section.

(i) A continuing education provider that was approved by the Department before the effective date of this section may continue to offer for credit continuing education courses that were approved by the Department before the effective date of this section, until August 31, 2007.

§76.1000. Technical Requirements--Locations and Standards of Completion for Wells.

(a) (No change.)

(b) In all wells where plastic casing is used, except when a steel or polyvinyl chloride (PVC) sleeve or pitless adapter, as described in paragraph (3) of this subsection, is used, a concrete slab or sealing block shall be placed above the cement slurry around the well at the ground surface.

(1) - (4) (No change.)

(5) The annular space of a closed loop geothermal well used to circulate water or other fluids shall be backfilled to the total depth with impervious bentonite or similar material, closed loop injection well where there is no water or only one zone of water is encountered you may use sand, gravel or drill cuttings to back fill up to ten (10) [~~thirty (30)~~] feet from the surface. The top ten (10) [~~thirty (30)~~] feet shall be filled with impervious bentonite or similar materials and meets the standards pursuant to Texas Commission on Environmental Quality 30 TAC, Chapter 331.

(c) In wells where a steel or PVC sleeve is used:

(1) (No change.)

(2) A slab or block as described in paragraph (1) and (2) of this subsection is required above the cement slurry except when steel casing or a pitless adapter is used. Pitless adapters may be used in such wells provided that:

(A) - (C) (No change.)

(d) - (f) (No change.)

(g) Each licensed well driller drilling, deepening, or altering a well shall keep any drilling fluids, tailings, cuttings, or spoils contained in such a manner so as to prevent spillage onto any [~~adjacent~~] property not under the jurisdiction or control of the well owner without the [~~adjacent~~] property owners' written consent.

(h) - (l) (No change.)

(m) Pump column material that has been used in the production of oil or gas or has been exposed to contamination may not be placed in a well regulated by this department.

§76.1004. Technical Requirements--Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones.

(a) All wells which are required to be plugged or capped under Texas Occupations Code Chapters 1901 and 1902 or this Chapter shall be plugged and capped in accordance with the following specifications and in compliance with the local groundwater conservation district rules or incorporated city ordinances:

(1) - (3) (No change.)

(4) In lieu of the procedure in paragraph (3) of this section, the well shall be pressure filled via a tremie tube with clean bentonite grout of a minimum 9.1 pounds per gallon weight followed by a cement plug extending from land surface to a depth of not less than two (2) feet, or if the well to be plugged has one hundred (100) feet or less of standing water the entire well may be filled with a solid column of 3/8 inch or larger granular sodium bentonite hydrated at frequent intervals while strictly adhering to the manufacturers' recommended rate and method of application. If a bentonite grout is used, the entire well from not less than two (2) feet below land surface may be filled with the bentonite grout. The top two (2) feet above any bentonite grout or granular sodium bentonite shall be filled with cement as an atmospheric barrier. Bentonite grout may not be used if a water zone contains chlorides above 1500 ppm or if hydrocarbons are present.

(5) (No change.)

(b) Large hand dug and bored wells 36-inches or greater in diameter to one hundred (100) feet in depth may be plugged by back filling with compacted clay or caliche to surface. All removable debris shall be removed from the well. If the well contains standing water, it shall be chlorinated by adding chlorine bleach at a rate of one (1) gallon of bleach for every five hundred (500) gallons of standing water. The backfill material shall be mounded above the surrounding surface [~~Leave mounded~~] to compensate for settling.

(c) Wells which do not encounter groundwater (dry holes) may be plugged by backfilling with drill cuttings from total depth to [~~within two (2) feet of~~] the surface. The backfill material shall be mounded above the surrounding surface to compensate for settling. [~~; where a two (2) feet cement plug shall be poured.~~]

(d) - (e) (No change.)

§76.1005. Technical Requirements--Standards for Water Wells (Drilled before June 1, 1983).

(a) Wells drilled prior to June 1, 1983, unless abandoned, shall be grandfathered from this chapter without further modification unless the well is found to be a threat to public health and safety or to groundwater quality. A threat to public health and safety or to groundwater quality shall include, but is not limited to the following:

(1) - (5) (No change.)

(6) water wells located within fifty (50) feet of a [~~close proximity to a potential~~] source of contamination which affects the [~~could negatively affect groundwater~~] quality of water produced by the well.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604795
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-7348

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16 TAC §76.220, §76.910

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Occupations Code, Chapters 51, 1901, and 1902, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51, 1901, and 1902. No other statutes, articles, or codes are affected by the repeal.

§76.220. Continuing Education.

§76.910. Disciplinary Actions--Disposition of Application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board proposes amendments to §273.4 concerning fees. The amendments raise the license renewal fees by $2.00 in order to provide funding for the appropriations made by the 79th Legislature. Amendments also change the late renewal fee for renewals one to ninety days late, and for renewals 90 to 365 days late, and the late fee for failure to timely obtain continuing education, since these fees are based on the license renewal fee.

Chris Kloeris, Executive Director of the Texas Optometry Board, has determined that, for the first five-year period the amendments are in effect there will be no fiscal implications for local government as a result of enforcing or administering the amendments. For state government, there will be increased revenue of $6,800.00 of the first year of the biennium and each year thereafter that the amended license fee amounts are in effect. Increased revenue of $390.00 each year will be realized due to the modification of the late renewal amount. Increased revenue of less than $100 of the first year and each year thereafter that fee amounts are in effect is expected from the amendment to the increase for late continuing education compliance.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that funding of programs authorized by the 79th Legislature including additional investigative travel, acquisition of information technology and salary adjustments are implemented, and that licensees will timely renew licenses.

The economic costs for persons who are required to comply with the amendments, including small businesses, will be the same additional $2.00 license fee increase for each license holder. No disparate effect is foreseen on small or micro-businesses as the fee is imposed on individual professionals regardless of the size of any business. The late renewal fee is only imposed on individuals failing to timely pay or obtain continuing education. Comments are solicited if a disparate cost of compliance can be established.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.152, 351.304, and 351.308. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession; §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act; §351.304 as setting the requirements for late renewal fees, and §351.308 as setting the fee for delayed continuing education compliance.

§273.4. Fees (Not Refundable).

(a) - (f) (No change.)

(g) License Renewal $184.00 [~~$182.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee re-

quired by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total fees: $385.00 [~~$383.00~~] active renewal; $185.00 [~~$183~~] inactive renewal

(h) License fee for late renewal, one to 90 days late: $276.00 [~~$273.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee required by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total late license fees: $477.00 [~~$474.00~~] active renewal; $277.00 [~~$274.00~~] inactive renewal

(i) License fee for late renewal, 90 days to one year late: $368.00 [~~$364.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee required by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total late license fees: $569.00 [~~$565.00~~] active renewal; $369.00 [~~$365.00~~] inactive renewal

(j) Late fees (for all renewals with delayed continuing education) $184.00 [~~$175.00~~]

(k) - (o) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 305-8502

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.8

The Texas State Board of Pharmacy proposes amendments to §283.8, concerning Reciprocity Requirements. The amendments, if adopted, will require reciprocity applicants to submit fingerprint information in order for the Board to access criminal history information.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are working in pharmacies as pharmacists. Individuals who are required to comply with this section will be required to pay a fee of approximately $50 for accessing criminal history information which includes the cost of submitting fingerprint information and paying associated costs to the Texas Department of Safety and Federal Bureau of Investigations.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §411.084 of the Government Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §411.084 as authorizing the agency to obtain criminal history information from the Federal Bureau of Investigations.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code; Chapter 411, Government Code.

§283.8. Reciprocity Requirements.

(a) All applicants for licensure by reciprocity shall:

(1) (No change.)

(2) meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs;

(3) [~~(2)~~] complete the Texas and NABP applications for reciprocity. (Any fraudulent statement made in the application for reciprocity is grounds for denial of the application; if such application is granted, any fraudulent statement is grounds for suspension, revocation, and/or cancellation of any license so granted by the board);

(4) [~~(3)~~] present to the board proof of initial licensing by examination and proof that their current license and any other license or licenses granted to the applicant by any other state have not been suspended, revoked, canceled, surrendered, or otherwise restricted for any reason; and

(5) [~~(4)~~] pass the Texas Pharmacy Jurisprudence Examination with a minimum grade of 75. (The passing grade may be used for the purpose of licensure by reciprocity for a period of two years from the date of passing the examination.) Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, shall retake the Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum grade of 75 is achieved.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 291. PHARMACIES

SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.21

The Texas State Board of Pharmacy proposes amendments to §291.21, concerning Notification to Consumers. The amendments, if adopted, will require pharmacies that maintain a generally accessible website to post on its home webpage, information on how to file a complaint with the Board.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure consumers using a pharmacy's webpage to obtain prescription drugs receive notification as to how to file a complaint with the Board. There is minimal fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section, which includes costs to modify the pharmacy's website to comply with the rule.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §§551.002, 554.051, and 562.1045 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.1045 as authorizing the agency to adopt rules requiring pharmacies that maintain a generally accessible site on the Internet to post certain information on how to file a complaint with the Board.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.21. Notification to Consumers.

(a) Pharmacy.

(1) Every licensed pharmacy shall provide notification to consumers of the name, mailing address, Internet site address, and telephone number of the board for the purpose of directing complaints concerning the practice of pharmacy to the board. Such notification shall be provided as follows.

(A) (No change.)

(B) If the prescription drug order is delivered to patients at their residence or other designated location, the pharmacy shall provide with each dispensed prescription a written notification in type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number of the board, and if applicable a toll-free telephone number for filing complaints)." If multiple prescriptions are delivered to the same location, only one such notice shall be required. The provisions of this paragraph do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

[~~(C) The provisions of this section do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).~~]

(2) A pharmacy that maintains a generally accessible site on the Internet and that is located in Texas or sells or distributes prescription drugs through this site to residents of this state shall post: [~~the following information on the pharmacy's initial home page and on the page where a sale of prescription drugs occurs.~~]

(A) on the pharmacy's initial home page, general information on how to file a complaint about the pharmacy with the board. For the purposes of this paragraph, the pharmacy's initial home page is the page where a consumer may order a prescription refill;

(B) specific information on how to file a complaint that is no more than two links away from the pharmacy's initial home page including the board's telephone number, mailing address, and Internet website address. This information may be provided through a link to the board's complaint process information on the board's webpage; and

(C) the following information on the pharmacy's initial home page and on the page where a sale of prescription drugs occurs:

(i) Information on the ownership of the pharmacy, to include at a minimum, the:

(I) owner's name or if the owner is a partnership or corporation, the partnership's or corporation's name and the name of the chief operating officer;

(II) owner's address;

(III) owner's telephone number; and

(IV) year the owner began operating pharmacies in the United States;

(ii) The Internet address and toll free telephone number that a consumer may use to:

(I) report medication/device problems to the pharmacy; and

(II) report business compliance problems.

(iii) Information about each pharmacy that dispenses prescriptions for this site, to include at a minimum, the:

(I) pharmacy's name, address, and telephone number;

(II) name of the pharmacist responsible for operation of the pharmacy;

(III) Texas pharmacy license number for the pharmacy and a link to the Internet site maintained by the Texas State Board of Pharmacy; and

(IV) the names of all other states in which the pharmacy is licensed, the license number in that state, and a link to the Internet site of the entity that regulates pharmacies in that state, if available.

(iv) A pharmacy whose Internet site has been awarded a Verified Internet Pharmacy Practice Site (VIPPS) certification by the National Association of Boards of Pharmacy shall be in compliance with this subparagraph by displaying the VIPPS seal on the pharmacy internet site.

[(A) Information on the ownership of the pharmacy, to include at a minimum, the:]

[(i) owner's name or if the owner is a partnership or corporation, the partnership's or corporation's name and the name of the chief operating officer;]

[(ii) owner's address;]

[(iii) owner's telephone number; and]

[(iv) year the owner began operating pharmacies in the United States;]

[(B) The Internet address and toll free telephone number that a consumer may use to:]

[(i) report medication/device problems to the pharmacy; and]

[(ii) report business compliance problems.]

[(C) Information about each pharmacy that dispenses prescriptions for this site, to include at a minimum, the:]

[(i) pharmacy's name, address, and telephone number;]

[(ii) name of the pharmacist responsible for operation of the pharmacy;]

[(iii) Texas pharmacy license number for the pharmacy and a link to the Internet site maintained by the Texas State Board of Pharmacy; and]

[(iv) the names of all other states in which the pharmacy is licensed, the license number in that state, and a link to the Internet site of the entity that regulates pharmacies in that state, if available.]

[(3) A pharmacy whose Internet site has been awarded a Verified Internet Pharmacy Practice Site (VIPPS) certification by the National Association of Boards of Pharmacy shall be in compliance with paragraph (2) of this subsection by displaying the VIPPS seal on the pharmacy internet site.]

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.34

The Texas State Board of Pharmacy proposes amendments to §291.34, concerning Records. The amendments, if adopted, will require pharmacies to supply records when requested by the Texas State Board of Pharmacy within 72 hours of the request.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure records are produced to the Board within 72 hours of a request. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.34. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), contained in Community Pharmacy (Class A) shall be: [kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.]

(A) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) - (4) (No change.)

(b) - (d) (No change.)

(e) Prescription drug order records maintained in a data processing system.

(1) (No change.)

(2) Records of dispensing.

(A) - (D) (No change.)

(E) In lieu of the printout described in subparagraph (B) of this paragraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him

or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy[, ~~the Texas Department of Public Safety, or the Drug Enforcement Administration~~]. If no printer is available on site, the hard-copy printout shall be available within 72 [~~48~~] hours with a certification by the individual providing the printout, which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(F) (No change.)

(G) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(i) (No change.)

(ii) The audit trail required in this subparagraph shall be supplied by the pharmacy within 72 [~~48~~] hours, if requested by an authorized agent of the Texas State Board of Pharmacy[, ~~Department of Public Safety, or Drug Enforcement Administration~~].

(H) Failure to provide the records set out in this subsection, either on site or within 72 [~~48~~] hours [~~for whatever reason~~], constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(I) - (J) (No change.)

(3) - (6) (No change.)

(f) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §291.55

The Texas State Board of Pharmacy proposes amendments to §291.55, concerning Maintenance of Records. The amendments, if adopted, will require pharmacies to supply records when requested by the Texas State Board of Pharmacy within 72 hours of the request.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure records are produced to the Board within 72 hours of a request. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.55. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under this section shall be: [~~kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies.~~]

(A) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) - (4) (No change.)

(b) Prescriptions.

(1) - (4) (No change.)

(5) Original prescription drug order records.

(A) - (B) (No change.)

(C) Original prescriptions shall be maintained in one of the following formats:

(i) (No change.)

(ii) within a patient medication record system provided that original prescriptions for controlled substances are maintained separate from original prescriptions for noncontrolled substances and [~~triplicate~~] prescriptions for Schedule II controlled substances are maintained separate from all other original prescriptions.

(D) Original prescription records other than prescriptions for Schedule II controlled substances [~~triplicate prescriptions~~] may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable.

(i) - (iii) (No change.)

(6) - (7) (No change.)

(c) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.75

The Texas State Board of Pharmacy proposes amendments to §291.75, concerning Records. The amendments, if adopted, will require pharmacies to supply records when requested by the Texas State Board of Pharmacy within 72 hours of the request.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure records are produced to the Board within 72 hours of a request. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.75. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.71 of this title (relating to Purpose), §291.72 of this title (relating to Definitions), §291.73 of this title (relating to Personnel), §291.74 of this title (relating to Operational Standards), and this section contained in Institutional Pharmacy (Class C) shall be: [~~kept by the institutional pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.~~]

(A) kept by the institutional pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) - (4) (No change.)

(b) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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22 TAC §291.76

The Texas State Board of Pharmacy proposes amendments to §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center. The amendments, if adopted, will require pharmacies to supply records when requested by the Texas State Board of Pharmacy within 72 hours of the request.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure records are produced to the Board within 72 hours of a request. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) - (d) (No change.)

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of §291.76 of this title (relating to Institutional Pharmacy (Class C)) shall be: [~~kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.~~]

(i) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) - (D) (No change.)

(2) - (7) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.105

The Texas State Board of Pharmacy proposes amendments to §291.105, concerning Records. The amendments, if adopted, will require pharmacies to supply records when requested by the Texas State Board of Pharmacy within 72 hours of the request.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure records are produced to the Board within 72 hours of a request. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.105. Records.

(a) Maintenance of records.

(1) Every record required to be kept under this section shall be: [~~kept by the pharmacy and be available, for at least two years from the date of such record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies.~~]

(A) kept by the pharmacy and be available, for at least two years from the date of such record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.3

The Texas State Board of Pharmacy proposes amendments to §297.3, concerning Registration Requirements. The amendments, if adopted, will prohibit a pharmacy technician from applying as a pharmacy technician trainee.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are working as pharmacy technicians and pharmacy technician trainees. There is no fiscal impact for small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§297.3. Registration Requirements.

(a) General. [~~Effective February 1, 2007, individuals who are not registered with the Board may not be employed as or perform the duties of a pharmacy technician or pharmacy technician trainee.~~]

(1) Effective February 1, 2007, individuals who are not registered with the Board may not be employed as or perform the duties of a pharmacy technician or pharmacy technician trainee.

(2) Individuals who have previously applied and registered as a pharmacy technician, regardless of the pharmacy technician's current registration status, may not register as a pharmacy technician trainee.

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604784
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 305-8028

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CHAPTER 311. CODE OF CONDUCT

22 TAC §311.1

The Texas State Board of Pharmacy proposes amendments to §311.1, concerning Procedures. The amendments, if adopted, clarify that complaints filed against a Board employee are handled by the Executive Director.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that complaints received against Board employees are handled appropriately. There is no fiscal impact for small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 20, 2006.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§311.1. Procedures.

(a) - (e) (No change.)

(f) Upon completing the review of the complaint and relevant statements or documents, the executive director shall render a decision concerning the complaint within 10 days and provide written notification of the decision to the employee, and his or her supervisor[~~, and board members~~] within five days of rendering the decision. The executive director shall notify the complainant of the disposition of the complaint. If the disposition of the complaint affects the employee's employment status, the employee has the right to exercise the board's grievance procedure.

(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604785
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 305-8028

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER E. CONTESTED CASES

22 TAC §661.99

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.99, concerning the Sanctions and Penalty Matrix. The new citations inserted into the Sanctions and Penalty Matrix will incorporate new sanctions for rules that were recently adopted. There will also be one citation removed because the rule cited does not exist.

The additions to the Sanctions and Penalty Matrix will clarify sanctions for §661.52 regarding Inactive Status, §661.55 regarding Certificate of Firm Name and §663.18 regarding what a surveyor can certify to. Section 661.45(g) was removed from the Matrix because there is not a rule regarding deception and/or cheating on an examination.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering the amended section.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amended rule because it will clarify the Sanctions and Penalty Matrix as it relates to currently adopted rules.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, Chapter 1071, §1071.151 of the Texas Occupations Code which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, concerning General Rules of Procedures and Practices.

§661.99. Sanctions and Penalty Matrix.

The Board, the Executive Director, Investigator, Administrative Law Judge or the participants in an Informal Conference may arrive at a greater or lesser sanction and penalty than suggested in this Rule. The minimum administrative penalty is $100 per violation. The maximum administrative penalty shall be $1500 per violation. In addition to the sanctions and penalties noted below, the Board may order restitution, suspension, probation and/or additional educational courses. Allegations and disciplinary actions will be set forth in the final Board Order and the severity of the disciplinary action will be based on the following factors:

(1) - (5) (No change.)

(6) any other matter that justice may require.

Figure: 22 TAC §661.99(6)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604530
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-5263

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER A. AUTOMOBILE INSURANCE

DIVISION 7. FINANCIAL RESPONSIBILITY VERIFICATION PROGRAM

28 TAC §§5.601 - 5.611

The Texas Department of Insurance (Department) proposes new Division 7, §§5.601 - 5.611, concerning the Financial Responsibility Verification Program (program) for motor vehicles and/or drivers. This proposal specifies program requirements, procedures, duties, and obligations for insurers writing personal automobile insurance policies that establish financial responsibility as required by the Texas Motor Vehicle Safety Responsibility Act, Transportation Code, Chapter 601.

SB 1670, which adds Subchapter N to Chapter 601 of the Transportation Code, was enacted by the 79th Legislature, Regular Session, to require the establishment of a program for verification of whether owners and/or drivers of motor vehicles have established financial responsibility as required by the Texas Motor Vehicle Safety Responsibility Act, Transportation Code, Chapter 601. Section 601.452(a) requires the Department, in consultation with the Texas Department of Public Safety (DPS), the Texas Department of Transportation (TxDOT), and the Texas Department of Information Resources (DIR) (the implementing agencies) to establish the program. The program must meet the specific statutory requirements of §601.452(a), including being most likely to: reduce the number of uninsured motorists in this state; operate reliably; be cost-effective; sufficiently protect the privacy of the motor vehicle owners; sufficiently safeguard the security and integrity of information provided by insurance companies; identify and employ a method of compliance that improves public convenience; provide information that is accurate and current; and also be capable of being audited by an independent auditor. Section 601.452(b) provides that the implementing agencies jointly adopt rules to administer the program. Section 601.452(b) requires the implementing agencies to convene a working group to facilitate implementation of the program, assist in the development of rules, and coordinate a testing phase. The working group is statutorily required to be composed of representatives of the implementing agencies, the insurance industry, and technical experts with the skills and knowledge necessary to create and maintain the program. SB 1670 became effective September 1, 2005, and beginning even before that date, the Department worked closely with the working group, including the implementing agencies, to facilitate the implementation of the program and the development of this proposal. The working group was first convened in July 2005, and subsequently met several other times. Proposed §§5.601 - 5.611 is the result of the process of joint consultation and coordination among the implementing agencies culminating with the individual agency proposal and adoption of rules necessary for that agency to meet its administrative requirements under the Transportation Code, Chapter 601, Subchapter N, and §502.1715. The Department will continue to work with the implementing agencies, the insurance industry, and technical experts to facilitate the implementation of the program and coordinate the testing of the program.

Additionally, as directed by Transportation Code, §601.453, the Department, in consultation with the other implementing agencies, has initiated a competitive bidding procedure for the purpose of selecting an agent to develop, implement, operate, and maintain the program. To avoid confusion with insurance related terms referencing agent, the term vendor is used in this proposal to refer to the §601.453 agent in lieu of the term program agent. The vendor shall also assist the Department and the other implementing agencies in establishing and publishing a Financial Responsibility Verification Program Guide and User Manual (manual) that clearly specifies requirements and procedures for providing information under the verification program. The manual will direct insurers with respect to specifications for compliance with the program, including the time and manner of reporting, the appropriate submission procedures, test plans, error correction procedures, programming languages, transmission protocols, encryption formats, submission formats, system reports, and other technical requirements. The manual is subject to change with respect to changes in technology and program experience. The manual will be available to insurers from the Department or by download from the Department's website.

This proposal implements §601.454(a) of the Transportation Code which requires each insurance company providing motor vehicle liability insurance policies in this state to provide necessary information for those policies to the vendor selected to develop and operate the program as provided in §601.453. This proposal is necessary to specify the requirements, procedures, duties, and obligations of insurers to comply with the program. In accordance with SB 1670, the proposed new sections are currently limited to those insurers providing motor vehicle liability insurance under a personal automobile insurance policy in this state. The program will be implemented for vehicles and/or drivers covered under commercial insurance policies in the future when the implementing agencies determine that it is feasible. The commercial program will be implemented through a separate rulemaking process. However, vehicles and/or drivers covered under a commercial policy may be reported at the insurer's option. Optional reporting of commercial vehicles and/or drivers must be done in the manner required in this proposal.

The proposed verification program contemplates verification of insurance during both an event based process and an ongoing verification process. The event based process allows users to obtain accurate and timely insurance information on a particular vehicle and/or driver promptly upon request. The ongoing verification process allows for the matching of insurer records to TxDOT data to identify uninsured vehicles on a continuous basis. Users of the event based process will be checking that the vehicle and/or driver have insurance in compliance with the Texas Motor Vehicle Safety Responsibility Act. Users will include TxDOT, law enforcement officers, and inspection stations.

The proposed verification program requires an insurer to use a vendor maintained database program or to elect to develop and maintain the insurer's own web services program. Users will access both programs through the vendor. In the database program, the vendor will maintain insurer submitted data. In the web services program, the insurer will link its data to the vendor. The Department will determine if an insurer's web services program meets the proposed rule requirements.

Insurers using the database system will submit personal automobile insurance policy records to the vendor. The submissions will be weekly and in compliance with the format and technical requirements set forth in the manual. The vendor will maintain the information in a database and perform matching functions for both the event based and ongoing verification processes. Additionally, the vendor will check the insurer information for errors against TxDOT and DPS maintained vehicle and driver information databases and report errors to the insurer. The insurer will then be responsible for evaluating the data errors and making any corrections that are possible. The insurer will be responsible for communicating with its policyholder with respect to information shown to be in error. The vendor will work with carriers having less than 1,000 in-force policies to develop cost effective database reporting procedures as necessary.

As an alternative to the database program, insurers may within 10 business days following the effective date of this proposal elect to use the web services program for compliance with the verification program. The web services program will require the insurer to receive and respond to both event based insurance verification inquiries and ongoing insurance verification inquiries. The insurer's web services program will link the insurer's insurance policy information to the vendor's system, and through the vendor to user connections, to allow for event based and ongoing verification processes. The web services program will require the insurer to design, develop, maintain, and submit specifications for a web services program application that is consistent with the system and performance requirements specified in this proposal and the manual. These requirements include checking and correcting the insurer's information against TxDOT data to obtain the required match rates. As with the database program, insurers will be responsible for evaluating errors and communicating with their policyholders. Insurers electing to use the web services program must also comply with the development timelines specified in the proposal. Any insurer that elects to use the web services program for compliance with the verification program will be required to use the database program if the insurer cannot meet or maintain the web services program timelines and requirements.

The Department, in consultation with the other implementing agencies as required under Transportation Code, §601.451(a), has established the database program as the primary method of verification program compliance. The database program will meet the legislative requirements set forth in §601.451(a) by being most likely to: (i) reduce the number of uninsured motorists through more thorough enforcement of the Texas Motor Vehicle Safety Responsibility Act by providing an enhanced means to identify uninsured vehicles and drivers during events such as traffic stops and vehicle inspections, as well as providing for continuous identification of uninsured vehicles through the ongoing verification process; (ii) operate reliably through use of a single vendor system; (iii) be cost effective considering currently available technology, information databases, and resources of the implementing agencies, users, insurance industry, and insured public; (iv) protect policyholder and insurer data through the use of standardized security measures; (v) provide convenience to the public because it does not impose additional procedures or requirements; (vi) provide available insurer information that is current and can be tested against TxDOT and DPS data for accuracy. The program is also capable of being audited.

The proposal also provides for voluntary participation in a test program that would use insurer provided key-data to provide verification of financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. This test program would not qualify as a means for compliance with the verification program. This test program should provide the Department with additional knowl-

edge and information to assist in the potential implementation of such a program in Texas.

The following is a section-by-section overview of the proposal. Proposed new §5.601 states the basic purpose and scope of the proposed new division. Proposed new §5.602 provides definitions for certain terms used in the division. Proposed new §5.603 describes the Financial Responsibility Verification Program Guide and User Manual (manual) and sets forth the requirement that insurers must use the manual. Proposed new §5.604 sets forth the reporting requirements for insurers using the database program. Proposed new §5.605 specifies the data error correction requirements for insurers using the database program. Proposed new §5.606 establishes the development time frame and submission requirements for insurers electing to use the web services program and also establishes a submission review and appeal process. Proposed new §5.607 establishes the system requirements for insurers electing to use the web services program. Proposed new §5.608 specifies the performance requirements for insurers electing to use the web services program. Proposed new §5.609 provides that insurers may delegate certain aspects of program compliance, but not responsibility for compliance, to a managing general agent and also establishes how insurers entering the Texas market more than 10 business days after the effective date of this proposal must comply with this division. Proposed new §5.610 identifies that insurers are subject to disciplinary action under the Insurance Code for violating the division and all persons are subject to criminal penalty for unauthorized disclosure of information under Transportation Code, §601.454(d). Proposed new §5.611 describes the voluntary test program and clarifies that participation in the program does not exempt the insurer from compliance with either the database or web services program.

C. H. Mah, Senior Associate Commissioner, Property and Casualty Program, has determined that, for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rules other than that resulting directly from the legislative enactment of SB 1670. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any costs incurred by the state are a direct result of the legislative enactment of SB 1670 which also provides for the collection of fees to be deposited to the state highway fund to carry out Transportation Code, Chapter 601, Subchapter N.

Mr. Mah has determined that, for each year of the first five years the proposed new sections are in effect, the anticipated public benefit will be a reduction in the number of vehicles and drivers in this state that are not in compliance with the Texas Motor Vehicle Safety Responsibility Act. In addition to addressing concerns regarding the large number of uninsured motorists in the state, the proposal will also assist in the reduction of fraud related to securing proof of financial responsibility and the expense and delay in resolving personal automobile insurance claims. This reduction will be achieved under the Financial Responsibility Verification Program (program) that has been established by the Department, in consultation with the Texas Department of Public Safety, the Texas Department of Transportation, and the Texas Department of Information Resources, as required by the Transportation Code, §601.451(a). An additional public benefit of the proposal is the specification of the requirements, procedures, duties, and obligations of insurers required to comply with the program which will result in greater efficiency by these insurers in fulfilling their role in implementing the program.

The total probable economic costs to each insurer to comply with this proposal will vary based on whether the insurer opts to participate in the database program or the web services program and is estimated to be within the range of several thousand to several million dollars per insurer depending on several factors discussed in this cost note analysis. While other state verification programs differ, both as to requirements of the program and the insurer's existing data systems, existing staff, number of policyholders and quality of data, a large insurer provided the legislature with information demonstrating a range of costs for implementing a verification program; costs for implementing in New York were approximately $1,300,000 versus costs for implementing a verification program in California of approximately $445,000. The Department has received information that indicates probable costs for insurers participating in the Texas database program will include approximately 80 hours of implementation programming time for an insurer with similar program experience in other states; less than 1 hour per week of employee time for data collection, approximately $500 per year for operational costs, transmission and maintenance; and error correction costs of $6.50 per policyholder call and $1.50 per policyholder letter. Overall, an insurers costs will depend on the insurer's existing data systems, existing staff, number of policyholders, and quality of data.

The insurer is not required to develop, maintain, and perform all required program functions in-house, but may also outsource some or all database or web services program requirements. The cost of outsourcing would be based on the insurer retaining a vendor to fulfill some or all of the insurer's requirements under the program. However, even if outsourcing is used, the insurer will remain responsible for compliance with the program requirements. The estimated costs for compliance would be required of any party actually implementing the requirements of this proposal; therefore, all references to the term insurer in this cost note analysis include a managing general agent that is acting under a delegation arrangement specified in proposed §5.609 of this subchapter (relating to Delegation and New Insurers).

The estimated costs of compliance for an insurer to comply with the database program are based on the following considerations. Each insurer participating in the database program must develop and maintain a system under which the insurer can weekly gather all of its available policyholder data into a batch file, transmit the data weekly to the vendor, and take required actions on vendor reported data errors. Further each insurer's actual costs will depend on the insurer's existing data system, existing staff, the number of policyholders, and the number of errors and inconsistencies in the insurer's policyholder data when compared to TxDOT data and/or DPS data. To analyze the insurer's current data system and develop the data collection program that is necessary for the insurer to implement the proposal, the insurer may need the services of computer software engineers for both computer applications and software development, computer programmers, a database manager, and computer support staff. While it is not feasible to determine the actual cost of such employees for all insurers, the Texas Workforce Commission's Labor Market & Career Information Department's 2005 Texas Statewide Wages, Occupational Employment Statistics Program indicates that the average hourly wages for these professions are $38.39 for a computer software applications engineer, $39.53 for computer software systems engineers, $31.79 for a database administrator, and $20.22 for computer support staff. The actual number, types of personnel and cost of personnel will be governed by the insurer's existing data systems,

number of policyholders, and current staffing. Creating the database may also require additional storage and processing capacity for the insurer. Once the batching program has been created, its operation should be automated and the required workforce could be limited to a database manager and computer support staff. It may not be necessary for these positions to be full-time. Additionally, once the database program has been implemented the insurer will need to have regular access to a high speed data transmission line to both transmit data to the vendor and receive error reports from the vendor.

The Department estimates that the greatest potential cost for insurers will be the processing of data errors the insurer will receive from the vendor, the mailing of notices to the insured's policyholders, subsequent communications with the insurer's policyholders regarding the notice and/or error, and error correction. Based on similar programs in other states, the insurer data may have an initial error rate approaching 20 percent. Because some insurers have hundreds of thousands of policies, this may result in sending tens to hundreds of thousands of error notices to policyholders, responding to policyholder inquiries concerning the notice, and inputting policyholder corrections into the insurer's data system. The Department anticipates that insurers will attempt to automate as much of this process as possible, and thus will incur costs as previously described for computer engineers, computer programmers, and computer support staff required to perform these functions as well as potential costs for additional computer hardware. Insurers will also need to have staff available, either directly or through their agents, to communicate with policyholders and/or enter data received from the policyholders. Data entry may be performed by data entry staff; however, insurers and agents may prefer direct oral communication with policyholders by a licensed agent or insurance service representative (ISR). Discussions involving policy terms and conditions with a policyholder would require a licensed agent or ISR. The Work Force Commission's 2005 wage guide indicates that the average hourly wages for these professions are $11.32 for data entry keyers and $25.89 for insurance sales agents. While the wage guide does not specify a wage for an ISR, it is estimated that their average hourly wage would be less than the average wage of an insurance sales agent. Again, the actual number, types of personnel and cost of personnel will be subject to the insurer's existing data systems, telephone connections, number of policyholders, and current staffing. In addition to addressing staff needs for error processing, insurers will also be required to send written notices to policyholders. The Department estimates that a separate notice letter will cost approximately $1.50 per letter in addition to programming or other preparation costs if the notice function is not automated. The estimated $1.50 cost is based on estimated costs for postage, printing or copying, and return envelope and postage, including 39 cents for postage; 10 cents per page for approximately two pages of forms explaining the notice and providing instructions and a one-page form to be marked and returned to the insurer; and 20 cents for a pre-printed return envelope (without postage). Subsequent notices could accompany a renewal notice, thus reducing the amount of postage. Overall, however, an insurer's actual cost of processing data error notices to the insurer's policyholders, subsequent communications with the insurer's policyholders regarding the notice, and/or error, and error correction will depend on the number of policyholders and the quality of the data that is available to the insurer.

The Department estimates that the probable cost of developing and maintaining the optional web services program will be greater than those an insurer would incur in complying with the database program. The requirements of participating in the web services program will include developing the data matching algorithm; developing and maintaining a web services program; maintaining open high-speed access to the insurer's data 24 hours a day, seven days a week; and potentially increased error correction efforts to achieve and maintain the required data match rates. These requirements will generate additional costs, including additional computer engineering, programming, and support staff, greater infrastructure to support the 24/7 access, and possibly more error notices and policyholder follow-up than may be necessary under the database program. The web services program is available only for those insurers that elect within the first 10 days after the effective date of the proposal to develop and maintain such a program. Under the proposal, an insurer may evaluate its specific situation with regard to developing its own web services program, and again with regard to continuing with the web services program, to determine which compliance program is more beneficial and cost-effective to the insurer and make a business decision accordingly.

An insurer may also choose, but is not required, to participate in the test program. Because the test program is not a method of compliance with the Financial Responsibility Verification Program, the costs associated with participation in the test program are not costs that are required for compliance with this proposal.

As a result of having a larger number of policies and thus the potential for more errors and the need for more error correction, the actual cost of compliance with the proposal may be substantially greater for large insurers than for small insurers. Based upon the cost of labor per hour, however, and the requirement that each insurer must create a system to compile certain data, compliance with the proposal may have a disproportionate economic impact on small or micro businesses. To alleviate this potential impact on small insurers, the proposal provides that the vendor and the Department will develop specific manual database program reporting procedures for insurers with less than 1,000 issued and outstanding personal automobile insurance policies. Even though the proposal may result in some adverse effect on small or micro businesses, the agency has considered the purpose of the applicable statutes, which is to enhance compliance with and enforcement of the Texas Motor Vehicle Safety Responsibility Act and reduce the number of uninsured drivers, and has determined that it is neither legal nor feasible to otherwise waive the provisions of the proposal for small or micro businesses. Additionally, it is the Department's position that the applicable statutes require all insurers providing motor vehicle liability insurance in this state under personal automobile insurance policies to participate in the financial responsibility verification program.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on October 9, 2006 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Gary Gola, Director, Data Services, Property and Casualty Program, Mail Code 105-5D, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of proposed new §§5.601 - 5.611 in a public hearing under Docket Number 2658, scheduled for October 3, 2006, 10:00.a.m., in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe

Street, Austin, Texas. Written and oral comments presented at the hearing will be considered.

The new sections are proposed under the Transportation Code, Chapter 601, Subchapter N and §502.1715, and the Insurance Code §36.001 and §36.201. Transportation Code, §601.451(a) requires the Department, in consultation with the Texas Department of Public Safety, the Texas Department of Transportation, and the Texas Department of Information Resources (the implementing agencies) to establish a program for verification of whether owners of motor vehicles and/or drivers have established financial responsibility as required by law. Section 601.452(b) authorizes the implementing agencies to jointly adopt rules to administer Chapter 601, Subchapter N. Transportation Code, §601.453(c) provides that the implementing agencies shall convene a working group to facilitate the implementation of the program and coordinate a testing phase and necessary changes identified in the testing phase. Transportation Code, §601.453 requires the Department in consultation with the other implementing agencies, under a competitive bidding procedure, to select a vendor to develop, implement, operate, and maintain the program. Transportation Code, §601.454 requires each insurance company providing motor vehicle liability insurance policies in this state to provide necessary information for those policies to allow the vendor to carry out the Transportation Code, Chapter 601, Subchapter N, subject to the vendor's contract with the implementing agencies and rules adopted under this subchapter; provides that the vendor is entitled only to information that is at that time available from the insurance company; and makes the information obtained under Transportation Code, Chapter 601, Subchapter N, confidential. Transportation Code, §502.1715(c) authorizes, subject to appropriation, the implementing agencies to use funds deposited to the credit of the state highway fund under that section to implement Transportation Code, Chapter 601, Subchapter N. Transportation Code, §502.1715(d) authorizes the implementing agencies to jointly adopt rules to administer Transportation Code, §502.1715. Insurance Code, §36.201 provides that an action of the Commissioner of Insurance, including a decision, order, rate, rule, form, or administrative or other ruling of the Commissioner, is subject to judicial review. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by this proposal: Transportation Code, §§601.451 - 601.454 and §502.1715; Insurance Code, §36.201.

§5.601. Purpose and Scope.

This division applies to insurers providing motor vehicle liability insurance in this state under personal automobile insurance policies. The division specifies the requirements, procedures, duties, and obligations of these insurers to comply with the Financial Responsibility Verification Program (program) established pursuant to the Transportation Code Chapter 601 Subchapter N.

§5.602. Definitions.

The following words and terms when used in this division shall have the following meanings unless the context clearly indicates otherwise.

(1) Back-up data--Data simultaneously copied, i.e. mirrored, to another physical location and storage device at set intervals.

(2) Cascading data matching--A data matching algorithm that uses multiple data fields to increase the accuracy and/or frequency of matched data.

(3) Cold site--A secure location where equipment would be shipped following a disaster.

(4) Critical time--The time in days per week and/or hours per day when the system is expected to be available and fully functional.

(5) Data--Information of any type.

(6) Database insurer--An insurer that elects to report insurance policy records directly to the vendor using the database program.

(7) Database program--A vendor maintained database, derived from insurance policy records submitted by insurers and vehicle and driver information maintained by TxDOT and DPS, created for the purpose of insurance verification during the event based and ongoing verification processes.

(8) Department--Texas Department of Insurance.

(9) DPS--Texas Department of Public Safety.

(10) Event based process--A data transmission process using the database and/or web services programs to promptly verify insurance coverage on a single vehicle and/or driver.

(11) Hot site--A secure location with data processing equipment already in place that can be activated in case of a disaster.

(12) Insurer--An insurance company or insurance carrier that writes motor vehicle insurance in this state, including stock companies, mutual companies, Lloyd's plans, county mutuals, farm mutuals, surplus lines carriers, and reciprocal exchanges.

(13) Manual--Financial Responsibility Verification Program Guide and User Manual.

(14) Match Rate--The percentage of insurance policy records matched to vehicles and/or drivers divided by the total number of all insurance policy records.

(15) Ongoing verification process--A data transmission process using the database and/or web services programs to verify financial responsibility of owners of motor vehicles on a continuing basis.

(16) Personal automobile insurance policy--A motor vehicle insurance policy providing the liability coverage required by the Texas Motor Vehicle Safety Responsibility Act in connection with the ownership, maintenance, or use of a private passenger, utility, or miscellaneous type motor vehicle, including a motor home, trailer, or recreational vehicle, that is owned or leased by an individual or individuals and not primarily used for the delivery of goods, materials, or services, other than for use in farm or ranch operations, including non-owner policies and mileage based policies.

(17) Program--Financial Responsibility Verification Program, including both the database program and the web services program.

(18) Recovery Point Objective (RPO)--The point in time at which the data processing services supporting the financial responsibility verification program are expected to be available following an outage.

(19) Recovery Time Objective (RTO)--The number of hours between the loss of data processing services until full services are expected to be available again.

(20) TxDOT--Texas Department of Transportation.

(21) User--A person that verifies insurance information through the Financial Responsibility Verification Program.

(22) Vendor--Agent selected to develop, implement, operate, and maintain the Financial Responsibility Verification Program.

(23) VIN--Vehicle identification number.

(24) Web services insurer--An insurer that elects to provide insurance policy record data to the vendor using a web services program.

(25) Web services program--A program developed and maintained by a participating insurer that complies with §§5.606, 5.607, and 5.608 of this subchapter (relating to Requirements for Insurers Using the Web Services Program, Web Services Program System Requirements and Web Services Program Performance Requirements).

§5.603. Financial Responsibility Verification Program Guide and User Manual.

(a) Each insurer writing personal automobile insurance policies in Texas shall comply with the Financial Responsibility Verification Program Guide and User Manual (manual) developed and maintained by the department and the department's vendor. The manual shall direct insurers with respect to technical aspects for compliance with the program, including specifying the time and manner of reporting, the appropriate submission procedures, test plans, error correction procedures, programming languages, transmission protocols, encryption formats, submission formats, system reports, and other technical requirements. The manual specifications are subject to change based on technology or program experience.

(b) The manual may be obtained from the Data Services Division of the Texas Department of Insurance, Mail Code 105-5D, P.O. Box 149104, Austin, Texas 78714 or the department website at www.tdi.state.tx.us.

§5.604. Reporting Requirements for Insurers Using the Database Program.

(a) Unless an insurer provides the department notice of its election to be a web services insurer under §5.606(b) of this subchapter (relating to Requirements for Insurers Using the Web Services Program), each insurer shall participate in the database program for the event based and ongoing verification processes.

(b) Except as required in §5.606 and §5.609 of this subchapter (relating to Delegation and New Insurers) each database insurer must begin compliance with this section and §5.605 of this subchapter (relating to Data Error Correction Requirements for Insurers Using the Database Program) beginning not earlier than January 1, 2007 and not later than March 31, 2007.

(c) In the manner and as specified in the manual, each database insurer shall submit weekly data on all of the insurer's personal automobile insurance policies in force. The data shall specify the following for each policy, policyholder, covered individual and vehicle covered, and as necessary each policy, policyholder, covered individual, and vehicle combination:

(1) company identifying information;

(2) policy identifying information, including applicable coverage dates;

(3) vehicle identifying information;

(4) policyholder and/or driver identifying information; and

(5) an insurer defined data field for insurer use.

(d) The weekly submission date and time shall be specified by the vendor and shall be approximately seven calendar days apart.

(e) The department and vendor will develop specific database program reporting procedures in the manual for insurers with less than 1,000 issued and outstanding personal automobile insurance policies.

§5.605. Data Error Correction Requirements for Insurers Using the Database Program.

(a) Each database insurer shall investigate and correct data errors identified by the vendor as required in subsection (e) of this section.

(b) Each database insurer shall provide sufficient and accurate data to meet and maintain a 98 percent match rate beginning January 1, 2008.

(c) The database insurer must be able to receive notice of data errors in the same manner that data is transmitted to the vendor, or a method that is mutually agreed upon by the vendor and the insurer.

(d) Data error codes and technical correction and communication procedures shall be specified in the manual and insurers shall comply with the manual when submitting corrected data.

(e) The database insurer shall receive notice of the following data errors from the vendor, and shall comply with the following data correction procedures:

(1) for data and/or file format errors, the database insurer will have three business days to correct errors and resubmit the entire data file to the vendor; and

(2) for insurance policy records not matched to a registered vehicle, the vendor will send the insurer up to two non-match notices per policy during a 60 calendar day period:

(A) upon receipt of the first non-match notice from the vendor, including notice for errors beyond the database insurer's authority to correct, the insurer must:

(i) send a written communication requesting confirmation of existing information or corrected information to the policyholder within 10 calendar days of receipt of the non-match notice;

(ii) consult the manual for suggested written communication format and content;

(iii) request that the policyholder respond to the written communication within 14 calendar days; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(iv) send any correction(s) received from the policyholder to the vendor within the next two regularly scheduled data transmissions; and

(B) upon receipt of the second notice of the non-match error from the vendor, including notice for errors beyond the database insurer's authority to correct, the insurer must:

(i) send a second written communication requesting confirmation of existing information or corrected information to the policyholder within 45 days of receiving the notice from the vendor or with a policy renewal notice, whichever comes first;

(ii) consult the manual for suggested written communication format and content;

(iii) request that the policyholder respond to the written communication within 14 calendar days; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(iv) send any correction(s) received from the policyholder to the vendor within the next two regularly scheduled data transmissions; and

(C) if the insurer receives no correction response from the policyholder, the insurer may, but is not required to, send additional notices to the policyholder concerning that non-match error.

(f) Each database insurer must maintain a record of its data correction activities and determinations for review by the vendor and the department for four years. The records may be stored electronically.

(g) Each database insurer must assist the vendor in auditing the database program, including responding to vendor requests for confirmation of policy records matched to a registered vehicle using cascading data matching. Cascading data matching may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy.

§5.606. Requirements for Insurers Using the Web Services Program.

(a) Each web services insurer must meet the requirements of the web services program through both the event based process and the ongoing verification process.

(b) Each insurer electing to use the web services program for the event based and ongoing verification processes must provide written notice to the department. Written notice must name the insurer, or each insurer in a group, be signed by an officer of the company or group, and be submitted to the Financial Responsibility Verification Program Coordinator, Property and Casualty Program, Mail Code 105-5C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, not later than 10 business days after the date this section is effective. All submissions to the department under this division must be made to the Financial Responsibility Verification Program Coordinator (coordinator) unless otherwise specified.

(c) Not later than 30 calendar days after the insurer notifies the department of its election to become a web services insurer, the insurer must submit to the coordinator for approval written documentation and specifications addressing §5.607(a) - (e) of this subchapter (relating to Web Services Program System Requirements). Written documentation and specifications must include a detailed project plan including a timeline, a full description of the proposed web services solution, and other information necessary to establish compliance with the web services program requirements, including the requirements specified in the manual. If it is determined as specified in subsection (i) of this section that the insurer's submission does not propose a solution that will meet all system and performance requirements, the insurer must begin program development to meet requirements of the database program as detailed in §5.604 and §5.605 of this subchapter (relating to Reporting Requirements for Insurers Using the Database Program and Data Error Correction Requirements for Insurers Using the Database Program).

(d) If an insurer's web services documentation and specifications have been determined to meet the system requirements of subsection (c) of this section and the insurer has obtained the appropriate department approval, the insurer must within 90 calendar days after receiving written notice of department approval as required in subsection (c) of this section submit to the coordinator for approval documentation showing that the web services insurer is capable of meeting all system and performance requirements detailed in §5.607 and §5.608 of this subchapter (relating to Web Services Program Performance Requirements). Such documentation must include a detailed progress report in compliance with the submitted project plan and timeline, and other information necessary to establish compliance with the web services program requirements, including the requirements specified in the manual. If it is determined as specified in subsection (i) of this section that the insurer's submission does not meet all system and performance requirements, the insurer must begin program development to meet requirements of the database program as detailed in §5.604 and §5.605 of this subchapter.

(e) Each insurer that has met the system and performance requirements of subsection (d) of this section must within 180 calendar days after receiving written notice of department approval as required in subsection (c) of this section submit to the coordinator for approval documentation showing the insurer is able to meet all system and performance requirements detailed in §5.607 and §5.608 of this subchapter. Such documentation shall include testing methodology, testing data sets, testing results, and other information necessary to establish compliance with the web services program requirements, including the requirements specified in the manual. If it is determined as specified in subsection (i) of this section that the insurer's submission does not meet all system and performance requirements, the insurer shall have 30 calendar days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(f) Following department approval as required in subsection (e) of this section, each web services insurer shall begin a data clean-up phase. Required data clean-up procedures include:

(1) the web services insurer will receive a file of registered vehicles from TxDOT and must match insurance policy records to the file of registered vehicles;

(2) insurance policy records that cannot be matched to a registered vehicle will be required to undergo a data correction process, including for errors beyond the web services insurer's authority to correct;

(3) as necessary, the web services insurer must contact the policyholder in writing to confirm or correct information. The insurer:

(A) must send an initial notice to a policyholder within 10 calendar days of discovering the information indicated to be in error;

(B) must consult the manual for suggested written communication format and content;

(C) must request that the policyholder respond to the written communication within 14 calendar days; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance;

(D) if no correction response is received, the insurer must send within 60 calendar days of discovering the information indicated to be in error a second notice, either separately or with a renewal notice sent during the 60 day period;

(E) must make any necessary correction within 15 calendar days after receipt of a response from the policyholder; and

(F) may, but is not required to, send additional notices concerning that non-match error to the policyholder if the insurer does not receive a correction response from the policyholder following the second notice; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(4) the web services insurer may request a reload of the DPS or TxDOT data as needed during the data clean-up/correction process; and

(5) the web services insurer must comply with all additional detail and specifications for the data clean-up phase as described in the manual.

(g) Each web services insurer must achieve and maintain a 98 percent match rate by January 1, 2008. The insurer and/or the vendor

shall submit information and documentation to the coordinator on request indicating whether the insurer has achieved the required match rate. If it is determined as specified in subsection (i) of this section that the insurer has not met the match rate and all system and performance requirements, the insurer shall have 30 days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(h) Each insurer approved to use the web services program must maintain all web service requirements. The coordinator may request information from the vendor and/or the insurer to confirm that the web services insurer is maintaining all web service requirements. If it is determined as specified in subsection (i) of this section that a web services insurer that has previously met all web services requirements is unable to maintain the system and performance requirements as required in this section and §5.607 and §5.608 of this subchapter and the requirements specified in the manual, the web services insurer shall:

(1) no longer be allowed to operate as a web services insurer; and

(2) have 30 days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(i) The procedure for determining whether an insurer has met the requirements of this section shall be as follows:

(1) In computing any period of time prescribed or allowed by this division, the day of the act, event, or default after which the designated period of time begins to run shall not be included, but the last day of the period so computed shall be included, unless it be a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday;

(2) On or before the date specified in subsections (c), (d), or (e) of this section, and as requested by the coordinator under subsections (g) or (h) of this section, the insurer shall submit all specifications, documentation, and other data to the coordinator;

(3) Within 14 calendar days of submission by the insurer, the coordinator shall review the submission and provide written notification to the insurer if the submission is determined to be in compliance or if it fails to meet the requirements;

(4) If the coordinator notifies the insurer that the submission fails to meet the requirements, the insurer may appeal to the commissioner for review of the coordinator's decision by making a written request to the coordinator within 20 calendar days of the date the insurer receives the coordinator's written decision. The written request for review must provide a rebuttal of the coordinator's written decision. If the insurer does not appeal the coordinator's written decision within the 20 calendar day period, the coordinator's written decision shall become final; and

(5) Within 14 calendar days of receiving the rebuttal, the commissioner, or the commissioner's authorized representative, shall make a written determination on the basis of the original submission, the coordinator's written decision, and the insurer's rebuttal.

(j) A decision under subsection (i)(5) of this section may be appealed under Texas Insurance Code §36.201.

(k) An appeal to the commissioner under subsection (i) of this section does not stay or extend the period for compliance with the database program under subsections (c), (d), (e), (g), and (h) of this section.

§5.607. Web Services Program System Requirements.

(a) A web services insurer must design, develop, maintain, and submit specifications for a web services program application capable of verifying the status of a policyholder's insurance information. The program must enable the insurer to receive and respond to the vendor's insurance verification inquiries on a single vehicle or motorist at a time during the event based process and to process batch inquiries of multiple vehicles during the ongoing verification process.

(b) The web services program transmission format and protocols must be compliant with XML standards as published by the World Wide Web Consortium (W3C).

(c) The insurer's web services program must incorporate basic web service infrastructure standards; select a common XML standard to align with the other web services infrastructure standards; and set forth procedures for agreement between insurers and the vendor to use one set of web services security standards, adhere to SOAP 1.1 standards, and use one set of authentication standards.

(d) The web services insurer must develop and implement an algorithm that matches policy and policyholder data to information provided by the vendor in the query process. The algorithm may also use cascading data matching that may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy. The algorithm must match information using:

(1) the VIN, if available, and one additional field; or

(2) at least two data fields provided by the vendor.

(e) Data fields provided by the vendor shall include:

(1) VIN;

(2) registered owner and/or driver driver's license number;

(3) vehicle make, model, and year;

(4) registered owner and/or driver name;

(5) registered owner and/or driver address;

(6) registered owner and/or driver date of birth; and

(7) specific policy coverage date, as applicable.

(f) For information found to be in error, each web services insurer continuing in the web services program must, as necessary, contact its policyholders in writing to confirm or correct information using the data clean-up procedures outlined in §5.606 of this subchapter (relating to Requirements for Insurers Using the Web Services Program).

(g) Each web services insurer must provide a disaster recovery plan that meets the following requirements:

(1) recovery time objective within two hours during the critical time period that is defined as seven days per week, 24 hours per day per program; a single data center solution is acceptable;

(2) recovery point objective consisting of the last data load;

(3) a hot site or cold site capable of meeting the recovery time objective; and

(4) back-up data consisting of weekly backup following the data load.

(h) Each web services insurer must provide up-time and availability of 99.8 percent for the event based process. This requirement excludes scheduled and planned outages for upgrades or maintenance; outages requested by the department; and outages resulting from the failure of any systems or components that are not owned, controlled, or contracted by the vendor or web services insurer, unless the cause

of the failure can be shown to have been a result of the web services insurer's negligence or malfeasance.

(i) Each web services insurer must comply with all procedures relating to data confidentiality and security standards, including:

(1) signing any documents necessary to enable the vendor to comply with the disclosure restrictions and privacy protections required by:

(A) the department;

(B) TxDOT;

(C) DPS;

(D) the Texas Department of Information Resources; and/or

(E) the Texas Law Enforcement Telecommunications System;

(2) adhering to the confidentiality provisions of Transportation Code Chapter 601 Subchapter N, including compliance with unique identifiers and passwords for user access to the program and entering into legal trading partner agreements with the vendor to exchange data via the web services program;

(3) adhering to the provisions of Texas Administrative Code Title 1, Part 10, Chapter 202 (relating to Information Security Standards); and

(4) adhering to any other procedures set forth to ensure that the program is protected against unauthorized access, disclosure, modification or destruction, whether accidental or deliberate, as well as to assure the availability, integrity, utility, authenticity, and confidentiality of information.

(j) Each web services insurer must also comply with specifications contained in the manual concerning system requirements, including when the specifications and technical system requirements are changed in the manual.

§5.608. Web Services Program Performance Requirements.

(a) The web services insurer must accept and respond to insurance verification inquiries from the vendor.

(b) The web services insurer must respond to inquiries in no more than 1.75 seconds, of which 0.25 seconds is allotted for transmission from vendor to insurer, and 0.25 seconds is allotted for transmission from insurer to vendor.

(c) The web services insurer must respond to the vendor with either an affirmative response and applicable information, or with a negative response as appropriate.

(d) Policy and policyholder data that the web services insurer must return with an affirmative response includes, to the extent that the information is at that time available from the insurer:

(1) company identifying information;

(2) policy identifying information, including applicable coverage dates;

(3) vehicle identifying information;

(4) policyholder and/or driver identifying information; and

(5) an insurer defined data field for insurer use.

(e) The web services insurer shall receive notification from the vendor of:

(1) any problems with the transmission of the inquiry response; and

(2) multiple affirmative responses to a verification request.

(f) On a monthly basis for the purpose of vehicle registration renewals, the vendor must, as required by TxDOT, submit to each web services insurer a file of registered vehicles approaching the registration renewal date. The web services insurer must mark as "insured" each registered vehicle for which an active insurance policy record is on file and return that file to the vendor within three days of receipt of the registration renewal file.

(g) Beginning on January 1, 2008, on a weekly basis for the purpose of ongoing verification, the vendor shall submit to each web services insurer a file of registered vehicles for which the insurer must:

(1) mark as "insured" each registered vehicle for which an active insurance policy record is on file and return that file to the vendor within three days of receipt of the registered vehicle file; and

(2) return to the vendor a file of all insurance policy records that could not be matched to a registered vehicle.

(h) Each web services insurer must maintain necessary information to assist the department in auditing the vendor's monthly and annual reports, including archiving:

(1) computer data files at least semi-annually for auditing purposes in an electronic format compatible with the department's computer systems that shall include:

(A) time a query is received to the hundredth of a second;

(B) time a query is responded to, to the hundredth of a second;

(C) query contents;

(D) query response; and

(2) program audit trails, document control, program access control and software change control.

(i) Each web services insurer must maintain its archived data for a minimum of four years.

(j) Each web services insurer must develop and implement maintenance plans that comply with the following:

(1) maintenance schedule as outlined by the department (with insurer and vendor input) and that may include modifications of the web services program after delivery to correct faults, improve performance, add other attributes, or adapt to a changed technical environment;

(2) coordination of all maintenance with the department that includes obtaining written approvals for the maintenance;

(3) a process for approval of exceptional or emergency maintenance; and

(4) provisions for corrective maintenance, adaptive maintenance, and perfective maintenance as set out in the manual.

(k) A web services insurer must also comply with specifications in the manual concerning system performance requirements, including changes in requirements that are specified in the manual.

§5.609. Delegation and New Insurers.

(a) An insurer may delegate by written contract the functions that the insurer is required to perform under the program to a department licensed managing general agent (MGA). A copy of the delega-

tion agreement must be submitted to the department's Financial Responsibility Verification Program Coordinator and the vendor. Under such delegation, both the MGA and the insurer shall be jointly and severally responsible for full compliance with this program and jointly and severally subject to disciplinary actions from the department for failure to meet program requirements.

(b) An insurer that commences writing personal automobile insurance in the Texas market more than 10 business days after the effective date of §5.606 of this subchapter (relating to Web Services Program), but before March 1, 2007, shall comply with the database program as detailed in §5.604 and §5.605 of this subchapter (relating to Reporting Requirements for Insurers Using the Database Program and Data Error Correction Requirements for Insurers Using the Database Program) and must begin reporting data on or before March 31, 2007.

(c) An insurer that commences writing personal automobile insurance in the Texas market on or after March 1, 2007 shall have 30 calendar days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

§5.610. Penalties.

(a) Failure of an insurer to comply with any of the requirements of this division shall subject the insurer to the enforcement and penalty provisions of the Insurance Code Chapters 82, 83, and 84 and any other applicable law.

(b) In accordance with Transportation Code §601.454, a person commits an offense if the person knowingly uses data obtained under Chapter 601, Subchapter N, for any purpose not authorized under Subchapter N. An offense under §601.454(d) is a Class B misdemeanor.

§5.611 Participation in Voluntary Testing Transmission System.

(a) In addition to complying with either the database or web services program requirements, an insurer may also participate in the testing of a transmission system based on the transmission of insurer-provided key-data to provide verification of compliance with the Texas Motor Vehicle Safety Responsibility Act. Participation in the test program does not qualify as means for compliance with the financial responsibility verification program.

(b) The test program will operate between the vendor and participating insurers only.

(c) The test program will apply to the event based process only.

(d) A volunteer insurer must submit at least one file of insurance policy records, including an insurer-specific key such as NAIC code, directly to the vendor.

(e) Further specifics for the test program will be developed by the participating insurers with the vendor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

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Gene Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 19. ELECTRONIC REPORTING

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§19.1, 19.3, 19.10, 19.12, and 19.14.

The new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas State Implementation Plan and as part of a program approval application for all of the commission's federally authorized, delegated, or approved programs.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement the United States Environmental Protection Agency's (EPA) new Cross Media Electronic Reporting Rule (CROMERR) as published in the October 13, 2005, issue of the *Federal Register* (70 FR 59848 - 59889), which became effective January 11, 2006. EPA finalized CROMERR to establish the framework for federal acceptability of electronic reports from regulated entities in order to satisfy specific document submission requirements from EPA regulations. Since states are delegated or authorized to implement certain federal programs, states must seek EPA approval to accept electronic documents for environmental programs that EPA has delegated, authorized, or approved states to administer in accordance with CROMERR. CROMERR does not require that any document or report be submitted electronically and it does not require that states receive electronic documents or reports. CROMERR establishes electronic reporting as an acceptable regulatory alternative, and establishes requirements to assure that electronic documents are as legally enforceable as their paper counterparts. Where states intend to receive documents or reports electronically, CROMERR specifies criteria for their acceptable submission, in order to ensure federal enforceability. Because CROMERR impacts the commission's authorized programs, creating Chapter 19 in 30 TAC to apply to all of those programs will minimize the need to revise rules for every authorized program now and in the future if EPA amends CROMERR. The process by which the TCEQ must obtain authorization for its electronic reporting program is generally the same process the agency follows in seeking approval for its environmental permitting programs. In the case of CROMERR, however, EPA has established a streamlined process that TCEQ can use to obtain such approval. That process includes a technical paper outlining how TCEQ's electronic document receiving system, and any known future enhancements, meet the requirements of CROMERR. The application must also include certification from the Office of the Attorney General that the rules and statutes in force in Texas are adequate to meet the requirements of CROMERR. This certification cannot take place until after the TCEQ rulemaking is effective. The TCEQ has until October 17, 2007, to apply for approval to continue accepting electronic reports and applications for our authorized programs for which the agency is currently receiving electronic reporting. The EPA has 75 days to determine whether the documents are administratively complete. Once the EPA determines that Texas has an administratively complete package, they have 360 days to determine if Texas has met the requirements of CROMERR. If EPA does not respond within the time frame, the system is automatically approved. For federally authorized programs not currently utilizing an electronic receiving system, there is no dead-

line specified; however, these programs may not initiate such systems until the agency receives approval under CROMERR.

The rules will establish a system for authorized programs to accept electronic submittal of reports, permit applications, and other specified documents using the commission's electronic document receiving system. These rules would establish that a person, as defined in 30 TAC §3.2(25), Definitions, who fails to comply with electronic reporting procedures will be subject to the same level of enforcement as one who fails to submit written documents as required.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, November 2004.

The commission proposes new Chapter 19, Electronic Reporting, to comply with the EPA's new CROMERR as published in the October 13, 2005, issue of the *Federal Register* (70 FR 59848 - 59889), which became effective January 11, 2006. The commission proposes the rules to define 11 terms, outline the applicability of the rules, explain the process of electronic signatures, and describe enforcement remedies for noncompliance.

Subchapter A. General Provisions

§19.1. Definitions.

Section 19.1 proposes to incorporate the definitions for: authorized program; copy of record; electronic document; electronic document receiving system; electronic signature; electronic signature agreement; electronic signature device; federal program; state program; handwritten signature; and signatory.

§19.3. Applicability.

Section 19.3 proposes to set forth the applicability of Chapter 19 to persons who submit electronic final documents to the commission to comply with regulation. This section also proposes that the chapter will apply to federally authorized programs and to state programs for which the commission has announced on its public Web site that it is accepting specified electronic documents. A person may submit documents electronically only if such announcement has been made. Electronic documents must be submitted to the commission according to the requirements of Chapter 19 and following the requirements of the commission's electronic document receiving system. The commission also proposes this rule to state that documents submitted via facsimile, magnetic, or optical media are not subject to Chapter 19, consistent with CROMERR, and are therefore exempt from the requirements of this chapter.

Subchapter B. Electronic Reporting Requirements

§19.10. Use of Electronic Document Receiving System.

Section 19.10 proposes to set forth the mandate that applicable electronic documents must be submitted according to the requirements of Chapter 19 using the commission's electronic document receiving system. It further states a person may not allow another individual to use the electronic signature device unique to his or her signature.

§19.12. Authorized Electronic Signature.

Section 19.12 proposes that when the electronic signature device is used to create an individual's electronic signature, the code or mechanism must be unique to that individual at the time the signature is created and the individual must be uniquely entitled to use it. The section also proposes to set forth the directive that a signatory will protect the electronic signature device from compromise and promptly report any evidence discovered that the device has been compromised. An electronic signature device is compromised if the code or mechanism is available for use by any other individual. It further requires that electronic documents must bear a valid electronic signature if a signature would be required by the regulatory program on the paper document. This proposal stipulates an electronic signature on an electronic document is valid if: it has been created with an electronic signature device that the signatory is uniquely entitled to use for signing; the device has not been compromised; and the signatory is authorized to sign the document. This section would establish that the signatory intended to sign the document and submit it to the commission by the presence of an electronic signature.

§19.14. Enforcement.

Section 19.14 proposes that an electronic signature is the legal equivalent of a handwritten signature. Section 19.14 proposes that a person is subject to appropriate penalties, fines, or other remedies under the commission rules or applicable statutes for failure to comply with a reporting requirement if the individual reports electronically and fails to comply with the applicable provisions for electronic reporting. This section states that nothing in Chapter 19 limits the use of electronic documents or information derived from electronic documents as evidence in enforcement proceedings.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the commission or other units of state or local governments as a result of administration or enforcement of the proposed rules. The commission proposes the rules to implement the EPA's new rule for electronic reporting. For consenting participants, the commission will use the TexasOnline Web portal to access the Texas Driver License (TDL) identity verification system to allow regulated entities to report required data electronically. The commission's costs to use TexasOnline's TDL identity verification are not expected to exceed $5,000 per year. The commission and other units of state and local governments may see cost reductions in paper and postage costs if more reporting of data is done electronically. Any cost reductions are not expected to be significant.

The commission proposes to add Chapter 19 to 30 TAC to implement CROMERR. CROMERR impacts federally authorized programs and places several requirements on the technical design of the electronic document receiving system used for federally authorized environmental programs. Chapter 19 will be an addition to existing reporting requirements specified in other program 30 TAC chapters, and will allow for the federally authorized programs and designated state programs to accept electronic submittal of reports, permit applications, and other commission documents. The commission proposes that by adding Chapter 19 to TAC, the need for future rulemaking as other programs incorporate electronic reporting will be minimized. The commission also proposes the rules to specify that a person who fails to comply with electronic reporting procedures will be subject to the same level of enforcement as one who fails to submit writ-

ten documents as required. The EPA requires the Office of the Attorney General in Texas to certify the rules and statutes in effect are adequate to meet the requirements of CROMERR. This certification cannot take place until the proposed rulemaking is complete, and is not expected to have a significant fiscal impact on the Office of the Attorney General.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be more timely and accurate reporting of environmental information which will facilitate better decision making and a more informed public.

Businesses and individuals may see reductions in paper and postage costs if more reporting of data is done electronically. Any cost reductions are not expected to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small or micro-businesses may see reductions in paper and postage costs if more reporting of data is done electronically. Any cost reductions are not expected to be significant.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The primary purpose of this proposed rulemaking action is to implement the EPA's new CROMERR as published in the *Federal Register* on October 13, 2005. The primary goal of this proposed rulemaking is to allow the commission to establish a voluntary system for the receipt of electronic documents under the commission's federally authorized programs and designated state programs and to provide standards of compliance and enforcement. The proposed rulemaking is procedural in nature and does not address environmental risks or exposures. Therefore, the proposed rulemaking does not constitute a major environmental rule, and thus is not subject to a formal regulatory analysis. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rulemaking action under Texas Government Code, §2007.043. The specific primary purpose of this proposed rulemaking is to implement the EPA's CROMERR and provide standards of compliance and enforcement for the commission to receive electronic reports and other documents under federally authorized programs and designated state programs. Promulgation and enforcement of the proposed rules will not affect private real property, because the proposed rulemaking is related to the commission's procedural rules, rather than substantive requirements. Implementation of the amendments will not result in any taking of real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed rules may affect owners and operators subject to the federal operating permits program. If the executive director, in the future, announces that it will accept certain reports required by operating permits electronically, owners and operators will have the option to use the commission's electronic document receiving system in lieu of submitting paper documentation.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 3, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality located at 12100 Park 35 Circle in Building F, Room 2210. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Holly Vierk, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Holly Vierk, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www.5.tceq.state.tx.us.rules/ecomments/*. All comments should reference Rule Project Number 2006-018-019-PR. The comment period closes October 9, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Ellette Vinyard, Permitting and Remediation Support, at (512) 239-6085.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §19.1, §19.3

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, which allows the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; §5.128, which authorizes the commission to encourage the use of electronic reporting; §26.011, which authorizes the commission to adopt rules regulating water quality; §26.345, which authorizes

the commission to adopt rules regulating petroleum storage tanks; §27.019, which authorizes the commission to adopt rules regulating underground injection wells; §28.011, which authorizes the commission to make and enforce rules for the protection of underground water; §26.040, which authorizes the commission to adopt rules necessary to implement a general permit program for water quality; and §37.002, which authorizes the commission to adopt rules for the occupational licensing and registration program; Texas Health and Safety Code, §382.017, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act; §341.031, which authorizes the commission to adopt and enforce rules regulating public drinking water and implementing the Federal Safe Drinking Water Act; §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; §361.121, which requires the commission to establish an electronic reporting system for holders of permits for the land application of sludge; §371.028, which authorizes the commission to adopt rules regulating management of used oil; and §374.051, which authorizes the commission to adopt rules to administer and enforce the dry cleaner program, and the Texas Business and Commerce Code, §43.007 (electronic document recognition), which provides legal recognition of electronic records, electronic signatures, and electronic contracts.

The proposed new sections implement Texas Water Code, §5.128, relating to electronic reporting; and CROMERR, the federal program for electronic reporting, 40 Code of Federal Regulations Parts 3, 9, 51, 60, 70, 71, 123, 142, 145, 162, 233, 257, 258, 271, 281, 403, 501, 745, and 763.

§19.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Authorized program--A federal program that the United States Environmental Protection Agency (EPA) has delegated, authorized, or approved the State of Texas to administer, or a program that the EPA has delegated, authorized, or approved the State of Texas to administer in lieu of a federal program, under other provisions of 40 Code of Federal Regulations and such delegation, authorization, or approval has not been withdrawn or expired.

(2) Copy of record--A true and correct copy of an electronic document received by an electronic document receiving system, which can be viewed in a human-readable format that clearly and accurately associates all the information provided in the electronic document with descriptions or labeling of the information. A copy of record includes:

(A) all electronic signatures contained in or associated with that document;

(B) the date and time of receipt; and

(C) any other information used to record the meaning of the document or the circumstances of its receipt.

(3) Electronic document--Any information that is submitted in digital form to satisfy requirements of an authorized program or other designated state programs. Information may include data, text, sounds, codes, computer programs, software, or databases.

(4) Electronic document receiving system--A set of apparatus, procedures, software, or records used to receive electronic documents.

(5) Electronic signature--Any information in digital form that is included in or associated with an electronic document for the purpose of expressing the same meaning and intention as would a handwritten signature if affixed to an equivalent paper document with the same reference to the same content.

(6) Electronic signature agreement--A document drafted by the executive director and signed by an individual with respect to an electronic signature device that the individual will use to create his or her electronic signature.

(7) Electronic signature device--A code or other mechanism that is used to create electronic signatures.

(8) Federal program--Any program administered by the United States Environmental Protection Agency under any provision of 40 Code of Federal Regulations.

(9) State program--Any program, other than a federal program administered by the United States Environmental Protection Agency under any provision of 40 Code of Federal Regulations, that is implemented by the commission under the Texas Water Code, Texas Health and Safety Code, and other laws of the State of Texas.

(10) Handwritten signature--The scripted name or legal mark of an individual, made by that individual with a marking or writing instrument such as a pen or stylus and executed or adopted with the present intention to authenticate a writing in a permanent form.

(11) Signatory--An individual authorized to and who signs a document using a format acceptable to the commission.

§19.3. Applicability.

(a) This chapter applies to:

(1) persons, as defined in §3.2 of this title (relating to Definitions), and signatories who submit official, final electronic documents to the commission to satisfy requirements of:

(A) authorized programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents; or

(B) state programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents;

(2) the commission's electronic document receiving system and other software applications implemented, revised, or modified as announced by the commission; and

(3) authorized programs and state programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents.

(b) This chapter does not apply to:

(1) documents submitted via facsimile; or

(2) electronic documents submitted via magnetic or optical media such as diskette, compact disc, digital video disc, or tape.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604723

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-0177

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SUBCHAPTER B. ELECTRONIC REPORTING REQUIREMENTS

30 TAC §§19.10, 19.12, 19.14

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, which allows the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; §5.128, which authorizes the commission to encourage the use of electronic reporting; §26.011, which authorizes the commission to adopt rules regulating water quality; §26.040, which authorizes the commission to adopt rules necessary to implement a general permit program for water quality; §26.345, which authorizes the commission to adopt rules regulating petroleum storage tanks; §27.019, which authorizes the commission to adopt rules regulating underground injection wells; §28.011, which authorizes the commission to make and enforce rules for the protection of underground water; and §37.002, which authorizes the commission to adopt rules for the occupational licensing and registration program; Texas Health and Safety Code, §382.017, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act; §341.031, which authorizes the commission to adopt and enforce rules regulating public drinking water and implementing the Federal Safe Drinking Water Act; §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; §361.121, which requires the commission to establish an electronic reporting system for holders of permits for the land application of sludge; §371.028, which authorizes the commission to adopt rules regulating management of used oil; and §374.051, which authorizes the commission to adopt rules to administer and enforce the dry cleaner program, and the Texas Business and Commerce Code, §43.007 (electronic document recognition), which provides legal recognition of electronic records, electronic signatures, and electronic contracts.

The proposed new sections implement Texas Water Code, §5.128, relating to electronic reporting; and CROMERR, the federal program for electronic reporting, 40 Code of Federal Regulations Parts 3, 9, 51, 60, 70, 71, 124, 142, 145, 162, 233, 257, 258, 271, 281, 403, 501, 745, and 763.

§19.10. Use of Electronic Document Receiving System.

(a) When the executive director has announced on the commission's public Web site that it is accepting specified electronic documents, individuals who submit to the commission electronic documents to satisfy requirements of authorized programs or designated state programs must use the commission's electronic document receiving system.

(b) Authorized signatories may not allow another individual to use the electronic signature device unique to his or her signature.

§19.12. Authorized Electronic Signature.

(a) When the electronic signature device is used to create an individual's electronic signature, the code or mechanism must be unique to that individual at the time the signature is created and the individual must be uniquely entitled to use it. Signatories shall:

(1) protect the electronic signature device from compromise; and

(2) report to the commission any evidence that the device has been compromised, within one business day of the discovery.

(b) An electronic signature device is compromised if the code or mechanism is available for use by any other individual.

(c) An electronic document must bear the valid electronic signature of a signatory if that signatory is required under the authorized program or the state program to sign the paper document for which the electronic document substitutes.

(d) An electronic signature on an electronic document is valid if it has been created with an electronic signature device that the identified signatory is uniquely entitled to use for signing that document; the device has not been compromised; and the signatory is an individual who is authorized to sign the document by virtue of his or her legal status and/or his or her relationship to the entity on whose behalf the signature is executed.

(e) The presence of an electronic signature on an electronic document submitted to the commission establishes that the signatory intended to sign the electronic document and to submit it to the commission to fulfill the purpose of the electronic document.

§19.14. Enforcement.

(a) An electronic signature on an electronic document submitted to the commission is the legal equivalent of a handwritten signature on a paper document submitted to the commission.

(b) Persons, as defined in §3.2 of this title (relating to Definitions), and signatories are subject to penalties, fines, and other remedies under commission rules or applicable statutes for failure to comply with a reporting requirement of the commission if the person or signatory reports electronically and fails to comply with the applicable provisions of this chapter, applicable statutes, commission rules, and the electronic participation agreement.

(c) Nothing in this chapter limits the use of an electronic document, copy of record, or information derived from electronic documents as evidence in enforcement proceedings.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 90. INNOVATIVE PROGRAMS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§90.2, 90.30, 90.36, 90.40, 90.42, and 90.44.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bills (HB) 2912 and 2997, 77th Legislature, 2001, created Texas Water Code (TWC), §5.131 and §5.127, respectively. These statutes require the commission to adopt, by rule, a comprehensive program that uses incentives to encourage entities to implement environmental management systems (EMSs). The statutes were passed in response to recommendations made by the Sunset Commission, as well as the Comptroller's *e-Texas* initiative. The intent of the legislation was to encourage regulated entities to use EMSs to help ensure compliance with applicable laws and regulations. In return, regulated entities could earn incentives, such as reduced inspection frequency and special consideration in their compliance history. The TCEQ adopted rules that took effect on December 16, 2001. The rules are codified in 30 TAC Chapter 90, Subchapter A, §90.1 and §90.2 and Subchapter C, §§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, and 90.44.

The TCEQ implemented the rules through the Lone Star and National Leader (i.e., the two highest) levels of the *Clean Texas, Cleaner World* (CTCW) program, TCEQ's voluntary recognition and incentive program. Entities that wished to join at those levels were required to implement an EMS that met a TCEQ EMS standard. Further, entities were required to make environmental improvements that went beyond or outside regulatory requirements to receive the incentives authorized by the statute.

A review of the CTCW program in the fall of 2005 concluded that changes to how the EMS statute was being implemented could improve and increase participation in CTCW. In February 2006, executive management recommended that entities no longer be required to implement an EMS that met a TCEQ EMS standard. Instead, the TCEQ would recognize any established EMS framework that meets the statutory provisions of the Texas Water Code. Further, it was recommended that TCEQ staff no longer conduct EMS audits for approval into the program. Finally, the name of the CTCW was changed to Clean Texas. The purpose of this rulemaking is to incorporate these changes.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004.

Subchapter A. Purpose, Applicability, and Eligibility

§90.2. Applicability and Eligibility.

The proposed amendment to subsections (e) and (f) would reflect the different compliance periods for each level of the Clean Texas program. Specifically, proposed subsection (e) would state that an entity could not have any state or federal court orders for either two years or three years, depending on the level of the program for which they are applying. The proposed amendment to subsection (f) would extend the compliance period for criminal convictions regarding a site from three years to five years for all levels that require an EMS.

Subchapter C. Regulatory Incentives for Using Environmental Management Systems

§90.30. Definitions.

The proposed amendment to §90.30 would add definitions for assessment, certified, and independent assessor, as well as renumber existing definitions accordingly. These definitions are necessary to reflect that the TCEQ will no longer conduct EMS audits, and that certified EMSs are necessary to receive regulatory incentives. Specific definitions would facilitate implementation, both for the agency and stakeholders.

§90.36. Evaluation of an Environmental Management System by the Executive Director.

The proposed amendment to §90.36 would provide a more streamlined assessment process. The proposed rules would specify that an EMS must be certified by an independent assessor, and would note the documentation necessary for eligibility review. The proposed amendments would also provide for verification visits for certain applications. The verification visits would not constitute EMS audits but would ensure that all entry requirements for participation in the Clean Texas program are satisfied.

Specifically, the proposed amendment to §90.36(a) would change eligibility requirements for regulatory incentives based on an EMS, including removing the option of the executive director performing the on-site audit. Also, the proposed amendment would alter terms according to changes proposed in §90.30 and renumber existing paragraphs accordingly.

The proposed amendment to §90.36(b) would replace the existing subsection with a provision stating the executive director may conduct an on-site verification visit as necessary to assure compliance with the program. The proposed amendment to subsection (c)(3) would change "attainment of environmental-performance improvement goals or targets" to "reasonable progress toward attainment" of those goals or targets. The proposed amendment to subsection (e) would delete the existing subsection and re-letter the rest of the section accordingly.

The proposed amendment to subsections (h) and (i) deletes references to an evaluation by the executive director or a third-party auditor and substitutes requirements for the use of an independent assessor and requires that the results of the independent assessment be provided to the executive director.

The proposed amendment to subsection (j) delineates criteria by which the executive director will review the use of an independent assessor. Several criteria would be deleted, including references to third-party auditors performing and documenting work in a manner similar to that of the executive director. The proposed amendment clarifies that the assessor is independent of the implementation of the EMS. Credentials of the independent assessor remain a criterion, while specific educational requirements are stricken. Certification of the assessor is included in the meaning of "credentials" rather than being expressly stated in the rule. The method of audit review is revised to include a requirement to confirm performance of the EMS, while striking specific time requirements.

§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.

The proposed amendment to §90.40 would change the executive director's considerations when evaluating a request for regulatory incentives which modify state or federal requirements. The proposed amendments to §90.40(c) clarify that the executive director can consider the establishment of and progress toward environmental performance improvement goals beyond or outside of regulatory requirement.

§90.42. Termination of Regulatory Incentives under an Environmental Management System.

The proposed amendment to §90.42(b) would make conforming changes to reflect the addition of terms in §90.30 and to allow independent assessors to conduct EMS audits in lieu of the executive director.

§90.44. Motion to Overturn.

The proposed amendment to §90.44 adds language whereby any person may file with the chief clerk a motion to overturn, not just those persons whose request for incentives has been denied or terminated. The proposed amendment makes the rules consistent with TCEQ rules that allow members of the public to file a motion to overturn.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. Other state agencies, local governments, and federal entities may voluntarily choose to have their environmental management system (EMS) approved by the agency. A cost-neutral impact is anticipated for any regulated entities that choose to establish an EMS and participate in the Clean Texas program.

The proposed rules would amend various sections of Chapter 90 of the Texas Administrative Code (TAC), which establishes an incentive program to encourage regulated entities to implement EMSs. A review of this program, named the Clean Texas program, concluded that it could be enhanced by making the changes contained in the proposed rules. The proposed rules would reflect different compliance periods for different levels of the program, provide for a more streamlined assessment process, require that certification of EMSs be done by independent assessors, and modify definitions and requirements of the program. Entities volunteering to get EMSs approved by the agency will be required to notify the agency and coordinate review of their EMSs at least six months before they expect to receive the agency's decision. To obtain agency approval, the EMS will be required to receive certification from an independent assessor.

The proposed rules are expected to have a cost-neutral impact on governmental entities volunteering to implement an EMS. Governmental entities can choose to have their own staff certify the system, if specified independence criteria are met. In addition, any costs incurred if a governmental entity chooses to employ an independent assessor are expected to be offset by cost savings that typically occur when an EMS is implemented. Costs to employ an independent assessor could range from $100 to $200 per hour.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater participation in the Clean Texas program and improved environmental performance by regulated entities.

No fiscal implications are anticipated for individuals or industry as a result of the proposed rulemaking. Participation in the Clean Texas program and the implementation of an EMS is strictly voluntary. The proposed rules are expected to have a cost-neutral impact on individuals or industry electing to establish an EMS. Any costs they may incur for obtaining independent certification of their system from an outside assessor are expected to be offset by cost savings that are typically experienced when an EMS is implemented. Costs to employ an independent assessor could range from $100 to $200 per hour.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Participation in the Clean Texas program and the implementation of an EMS is strictly voluntary. The proposed rules are expected to have the same cost-neutral effect on small or micro-businesses that they would have on individuals and large businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules would not adversely affect a local economy in a material way for the first five years that the proposed rules would be in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). Although this rule is proposed to protect the environment and reduce the risk to human health from environmental exposure, it would not be a major environmental rule because it would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, the proposed rule does not meet any of the four applicability requirements listed in §2001.0225(a). The rule would not exceed a standard set by federal law because standards in the proposed rules are in accordance with the corresponding federal regulations, and they do not exceed an express requirement of state law. The proposed rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The rulemaking proposes a rule under specific state law (i.e., Texas Water Code, §5.131 and §5.127). Finally, this rulemaking is not being proposed on an emergency basis either to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

In accordance with Texas Government Code, §2007.043, the commission has prepared a takings impact assessment for the proposed rule. The following is a summary of that assessment. The specific purpose of the proposed rule is to enhance the TCEQ's EMS program. Promulgation and enforcement of the proposed rule would not affect private property mainly because it would not require anyone to do anything; everything it proposes is strictly voluntary. The proposed standards are not more stringent than existing standards. For these reasons, the proposed rule would not be a burden to private real property and would not constitute a taking under Texas Government Code, Chapter 2007. The proposed rule would not affect a landowner's rights in private real property.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. In accordance with 31 TAC §505.22, the commission has prepared a consistency determination for the proposal and has found that it is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). CMP policies focus on construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq*. Promulgation and enforcement of this rule would be consistent with the applicable CMP goals and policies because it would provide a framework that landfills could voluntarily use to help ensure and go beyond compliance with applicable laws. Thus, the rule would serve to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. Changing the rules on environmental management systems will not impact new solid waste facilities and areal expansions of existing solid waste facilities. The commission has determined that the specific actions detailed in this section and earlier in this preamble under the sections explaining the proposed rule, concerning explanation of the proposed rule, final regulatory impact assessment, and takings impact assessment will comply with the goals and policies of the CMP. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2006-028-090-AD. The comment period closes October 9, 2006. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Larissa Peter, Small Business and Environmental Assistance Division, at (512) 239-3766.

SUBCHAPTER A. PURPOSE, APPLICABILITY, AND ELIGIBILITY

30 TAC §90.2

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and TWC, §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization is derived from TWC, §5.131 and TWC, §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities; and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. The proposed rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities. Finally, this amendment is also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendment implements HB 2912 and HB 2997, 77th Legislature, 2001, which created the requirements for Environmental Management Systems under TWC, §5.131, Environmental Management Systems, and §5.127, Regulatory Flexibility.

§90.2. Applicability and Eligibility.

(a) - (d) (No change.)

(e) A person who has been referred to the Texas or United States attorney general and has incurred a judgment against the site for which the person is requesting regulatory incentives, is ineligible to receive regulatory incentives at that site for using an EMS for a period of two or three years from the date the judgment was final, depending on the level of the program for which the person is applying.

(f) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting regulatory incentives is ineligible to receive regulatory incentives for using an EMS for a period of five [~~three~~] years from the date of the conviction.

(g) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604726
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-5017

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SUBCHAPTER C. REGULATORY INCENTIVES FOR USING ENVIRONMENTAL MANAGEMENT SYSTEMS

30 TAC §§90.30, 90.36, 90.40, 90.42, 90.44

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and TWC, §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization is derived from TWC, §5.131 and TWC, §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities; and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other

request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. The proposed rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities. Finally, these amendments are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendments implement HB 2912 and HB 2997, 77th Legislature, 2001, which created the requirements for Environmental Management Systems under TWC, §5.131, Environmental Management Systems, and §5.127, Regulatory Flexibility.

§90.30. Definitions.

The following words and terms, when used in this subchapter, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Assessment--On-site review of the environmental management system by an independent assessor.

(2) Certified--For purposes of this subchapter, a documented decision that the environmental management system meets either the minimum standards of this subchapter or another recognized environmental management system standard which is substantively equivalent to the minimum standards.

(3) [~~(1)~~] Environmental aspect--Element of a person's activities, products, or services that can interact with the environment.

(4) [~~(2)~~] Environmental impact--Any change to the environment, whether adverse or beneficial, wholly or partially resulting from a person's activities, products, or services regarding a specific site.

(5) [~~(3)~~] Environmental management system--A documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement.

(6) Independent assessor--A person or team of people, at least one of whom has appropriate professional credentials and experience to review an environmental management system. The assessor(s) must not have contributed to the development of the system being assessed.

(7) [~~(4)~~] Site--For purposes of this subchapter, any individual location or contiguous location of a person.

§90.36. Review [~~Evaluation~~] of an Environmental Management System by the Executive Director.

(a) A person must submit written documentation of the person's environmental management system (EMS) for a specific site as part of a written request for approval of the [~~an on-site evaluation of that~~] site's EMS to the executive director to be eligible to receive regulatory incentives under this subchapter [~~except as described in subsection (b) of this section~~]. The documentation must include:

(1) - (5) (No change.)

(6) list of any independent [~~or third-party reviews or~~] certifications that have been completed on the EMS;

(7) (No change.)

[~~(8) date when the requestor would be ready to have the executive director conduct a formal on-site evaluation of the EMS or whether the person will be requesting approval of the person's third-party auditor(s);~~]

(8) [~~(9)~~] a description of the regulatory incentives of interest to the person regarding that site;

(9) [~~(10)~~] any other information requested by the executive director during the review [~~evaluation~~] period; and

(10) [~~(11)~~] signature of the requestor or the duly authorized agent, that certifies that all information is true, accurate, and complete to the best of that person's knowledge.

(b) The executive director will determine, based on risk, if an on-site verification visit shall be conducted by the executive director to assure that all requirements have been met.

[~~(b) A person who qualifies as a Clean Texas Leader is exempt from providing documentation for the EMS regarding the specific site to the executive director if the information the person submitted to qualify to become a Clean Texas Leader is still current. Clean Texas Leaders must still submit a written request to the executive director for an on-site evaluation of the EMS to be eligible for regulatory incentives under this subchapter.~~]

(c) If the request for regulatory incentives is solely to request additional incentives under the EMS regulatory incentive program for an EMS that has already been approved by the executive director, the person is exempt from the submittal requirements of subsection (a) of this section. The executive director will act on the request in accordance with the time frames in §90.40(d) of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System). The person must instead submit the following information:

(1) - (2) (No change.)

(3) any additional information requested by the executive director to evaluate the regulatory incentive request including demonstration of reasonable progress toward attainment of environmental performance improvement goals or targets.

(d) Within 90 days of submission of the request for review [~~evaluation~~] of an EMS, the executive director shall notify the requestor in writing of whether the information provided is complete or whether additional information must be submitted to the executive director.

[~~(e) Within 90 days of submission of the request for an on-site evaluation of an EMS, the executive director will schedule with the requestor an on-site evaluation to be performed by the executive director or allow the use of the results from an approved third-party auditor that satisfies the evaluation criteria in subsection (j) of this section.~~]

(e) [~~(f)~~] The executive director will notify the person who submitted the request for review [~~evaluation~~] of whether the EMS qualifies for regulatory incentives under this subchapter. If the EMS does not qualify for regulatory incentives under this subchapter, the executive director will send the person who requested a review [~~an evaluation~~] of the EMS a notice detailing where the EMS does not meet the standards in §90.32 of this title.

(f) [~~(g)~~] If the person makes no formal response within 90 days to the executive director's request regarding areas where the EMS does not meet the standard in §90.32 of this title, the EMS review [~~evaluation~~] will be placed on inactive status and the person may be required to submit additional information to demonstrate compliance with this subchapter.

(g) [(h)] If a person receives regulatory incentives under this subchapter for a specific site, the executive director will require an additional independent reassessment [schedule a follow-up on-site evaluation by the executive director or authorize the use of an approved third-party auditor to conduct a follow-up on-site evaluation] of the EMS at least every three years from the date of the initial assessment [evaluation]. Results of this reassessment must be provided to the executive director. Regulatory incentives granted prior to the three-year reassessment [evaluation] will remain in effect until such time as the executive director terminates them under §90.42 of this title (relating to Termination of Regulatory Incentives under an Environmental Management System).

(h) [(i)] Any areas in which an independent assessor [the executive director or an approved third-party auditor] finds the EMS does not meet the standards in §90.32 of this title during the reassessment [follow-up evaluation] shall be corrected in accordance with the schedule required by the independent assessor [executive director]. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives may be terminated under §90.42 of this title.

(i) [(j)] In order for the executive director to approve the use of an independent assessor [a third-party auditor(s) to complete the on-site evaluation of the EMS or to recognize the results of past evaluations completed on an EMS as equivalent to the executive director's review process], the following criteria shall be considered by the executive director:

[(1) ability of the auditor's EMS review protocols to meet the same requirements as the executive director's audit protocols;]

[(2) ability of the auditor's documentation of the EMS evaluation process to provide comparable information to the commission that the executive director would collect if completing the same evaluation;]

(1) [(3)] independence of the assessor from the implementation of the EMS; [third-party auditor completing the evaluation;]

(2) [(4)] credentials of the independent assessor; [demonstrated experience of the auditor in EMS programs and environmental regulatory programs and auditing;]

(3) [(5)] method of assessment [audit review--time allotted for review of documentation versus field observation and personnel interviews] to confirm performance of the EMS; and

[(6) educational background of auditor;]

[(7) certifications already granted to the auditor by other audit/standards bodies for EMS or auditing methodologies; and]

(4) [(8)] any other information the executive director deems necessary to verify the capability of the assessor [auditor] to complete the assessment [evaluation] process [as the executive director would have if he completed the evaluation].

§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.

(a) (No change.)

(b) Where approval by the executive director is required under this subchapter, the executive director shall consider, among other factors:

(1) the compliance history of the person who submitted the EMS; [and]

(2) - (3) (No change.)

(4) if the request is specifically for additional incentives after the review [evaluation] of the EMS has been completed and approved, or for reconsideration of granting an incentive that was previously denied, the progress made at a site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

(c) When considering regulatory incentives which modify state or federal requirements, the executive director shall consider the steps the person has taken at the site to establish and make progress toward environmental performance improvement goals beyond or outside of regulatory requirements. [develop an EMS that exceeds the minimum requirements in §90.32 of this title.]

(d) Where approval by the executive director is required under this subchapter, the executive director shall act within 60 days of notifying the person that the EMS meets the standards outlined in this subchapter. If a request for additional regulatory incentives is submitted under §90.36(c) of this title (relating to Review [Evaluation] of an Environmental Management System by the Executive Director), the executive director shall act on the request within 60 days of its submission. These time frames may be extended at the request of the person or the executive director to allow additional approval time for incentives that require approval by the EPA for implementation or adoption by rule.

§90.42. Termination of Regulatory Incentives under an Environmental Management System.

(a) (No change.)

(b) Termination by the executive director.

(1) (No change.)

(2) If a person who is approved to use regulatory incentives for a specific site under this subchapter is found by the executive director or an independent assessor [approved third-party auditor] to no longer meet the requirements of this subchapter, the executive director shall notify the person in writing of the deficiencies found.

(3) Any areas in which the executive director or an independent assessor [approved third-party auditor] finds the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems) based on a reassessment [during the follow-up evaluation] shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives will be terminated under this section.

(4) (No change.)

§90.44. Motion to Overturn.

Any person who has requested approval of an environmental management system (EMS) and whose EMS was denied approval, any person who has been notified by the executive director that the approval for the person's system has been terminated, any person who has been denied regulatory incentives that the executive director is authorized to approve under §90.40 of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System), any person [or] who has been notified by the executive director that a regulatory incentive has been terminated, or any other person may file with the chief clerk a motion to overturn the executive director's decision. A motion must be filed within 23 days after the date the commission mails notice of the executive director's decision to the person. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn Executive Director's Decision).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-5017

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§116.110, 116.116, 116.615, 116.710, 116.721, 116.787, 116.805, 116.820, 116.930, 116.1020, 116.1021, and 116.1424.

The proposed amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Senate Bill (SB) 1740, passed by the 79th Legislature, 2005, affects several aspects of air permitting. Section 1 of SB 1740 created new Texas Health and Safety Code (THSC), §382.004, Construction While Permit Application Pending. This section allows an applicant seeking a permit for a modification (or lesser change) to an existing facility to begin construction related to the application after the application is submitted, and before the commission has issued the permit. The decision to begin construction is at the applicant's own risk. The provisions of THSC, §382.004 also prohibit the commission from considering construction as a factor in determining whether to grant the permit sought in the application. Because existing commission rules require persons to obtain the permit prior to commencing construction, revisions are necessary to maintain consistency with the revised statute. The proposed rules would revise Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, to ensure that an applicant has the option to commence construction once an application for a modification or lesser change to an existing facility has been received by the commission. SB 1740 only authorizes construction to the extent permissible under federal law, so projects subject to federal Prevention of Significant Deterioration (PSD) or federal Nonattainment New Source Review (NNSR) permitting would not be eligible because federal regulations governing those programs do not allow construction to begin before the permit is issued.

Section 2 of SB 1740 amended THSC, §382.05195, Standard Permit, to modify how distance limits, setbacks, and buffers are evaluated at facilities authorized by an air quality standard permit. Under new THSC, §382.05195(j), if a standard permit requires a distance limit, setback, or buffer from other properties or structures, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

Chapter 116 must be revised to maintain consistency with the new statutory requirements concerning distance limits, setbacks, and buffers for standard permits. The proposed rules would incorporate the new distance limit, setback, and buffer zone provisions of THSC, §382.05195(j) into the general rules for standard permits.

The proposed rules also include minor administrative changes to address outdated references, typographical errors, and conformity to Texas Register requirements and other agency rules and guidelines.

The commission is also proposing concurrent rulemaking to 30 TAC Chapter 321, Control of Certain Activities by Rule, in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

§116.110. Applicability.

The commission proposes to amend §116.110(a) to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued. The commission proposes to amend §116.110(a)(1)(D) for consistency with 30 TAC Chapter 330, Municipal Solid Waste, which now includes standard permits in additional subchapters (such as the standard permit for municipal solid waste landfill facilities and transfer stations in 30 TAC Chapter 330, Subchapter U).

§116.116. Changes to Facilities.

The commission proposes to amend §116.116(b)(2) and (c)(2) to reference new §116.116(g). The proposed changes are necessary to allow permit applicants for projects which meet the THSC, §382.004 criteria to initiate construction before the permit is issued.

The commission proposes to amend §116.116(b)(3) to correct a reference to Subchapter E, relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). The existing rule mistakenly refers to Subchapter C; the correct reference is Subchapter E.

The commission proposes to amend §116.116(e)(3) to correct a typographical error.

The commission proposes to amend §116.116(f) to update several citations and references relating to emission credit banking and trading.

The commission proposes new §116.116(g), which allows an applicant for a project that meets the THSC, §382.004 criteria to initiate construction before the permit is issued (once the permit application has been received). In order to qualify under the proposed subsection, the project must be a modification or lesser change to an existing facility, or the addition of a new facility or facilities under an existing permit. The proposed rule is drafted more broadly than the corresponding statutory language contained in THSC, §382.004, which only refers to the modification of (or lesser change to) an existing facility. The proposed rule would allow the addition of new facilities under an existing permit, in addition to the modification of an existing facility. This broader approach is necessary because the statutory language could be interpreted to mean that an applicant could not add any new equipment or any new sources of emissions. A narrow ap-

plication of the statute would sharply limit its utility because most projects that trigger the requirement to obtain a permit amendment involve the addition of new equipment and new sources of emissions. The commission believes that SB 1740 and the associated statute was not intended to exclude the addition of new equipment at existing permitted sites. The commission invites comment on the proposed language concerning the construction of new facilities under an existing permit.

In addition, the project must not trigger federal PSD or NNSR permitting because those federal permitting programs require preconstruction authorization. Applicants electing to initiate construction before the permit is issued do so at their own risk. The commission is prohibited from considering such construction as a factor in determining whether to issue the permit. If issues arise concerning best available control technology (BACT), protection of human health and the environment, compliance with applicable regulations, or other concerns, an applicant that has already initiated construction may face considerable expense to rework the project to satisfy applicable permit requirements. Although the proposed rules would allow construction or modification before the relevant permit is issued, the proposed rules prohibit operation of any facility until a permit authorizing the facility has been issued. This restriction is necessary so that the impacts from the facility are reviewed in advance, to ensure protection of human health and the environment.

Proposed §116.116(g) only applies to requests for permit amendments, and cannot be applied to requests, claims, registrations, or applications for a permit by rule (PBR) or a standard permit. PBRs and standard permits already provide a streamlined mechanism to authorize facilities and changes to facilities.

§116.615. General Conditions.

The commission proposes new §116.615(11) to implement THSC, §382.05195(j). Under the proposed rule, if a standard permit requires a distance limit, setback, or buffer from other properties or structures, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility. The proposed rule would override and supercede any conflicting requirement concerning distance limits, setbacks, or buffers in any standard permit.

§116.710. Applicability.

The commission proposes to amend §116.710(a) to allow an applicant to initiate construction before a flexible permit is issued in cases that meet the criteria of THSC, §382.004 and §116.116(g). Flexible permit projects that trigger federal PSD or NNSR permitting are not covered under THSC, §382.004 and §116.116(g) and are still required to obtain the permit before any actual work is begun.

§116.721. Amendments and Alterations.

The commission proposes to amend §116.721(a) and (b)(2) to reference new §116.116(g), so that applicants for flexible permit amendments which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.787. Amendments and Alterations of Permits Issued Under this Division.

The commission proposes to amend §116.787 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.805. Amendments and Alterations for Existing Facility Flexible Permits.

The commission proposes to amend §116.805 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.820. Modifications.

The commission proposes to amend §116.820 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.930. Amendments and Alterations of Permits Issued Under this Subchapter.

The commission proposes to amend §116.930 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.1020. Modifications.

The commission proposes to amend §116.1020 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.1021. Amendments and Alterations.

The commission proposes to amend §116.1021(b)(2) to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

§116.1424. Amendments and Alterations of Permits Issued Under this Subchapter.

The commission proposes to amend §116.1424 to reference new §116.116(g), so that permit applicants for projects which meet the THSC, §382.004 criteria may initiate construction before the permit is issued.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. Certain units of state or local governments that own or operate facilities requiring air quality standard permits and some New Source Review (NSR) permits may experience some economic benefit as a result of administration or enforcement of the proposed rules.

The proposed rules would implement provisions of SB 1740 and address two new statutory requirements. First, the proposed amendments would allow applicants for some NSR permits, at their own risk, to modify an existing facility or to begin construction related to the application after it has been received by the commission, and before the commission has issued the permit. Projects that trigger PSD or NNSR are excluded and must still obtain the permit before construction begins. Secondly, the proposed amendments provide that facilities required to meet cer-

tain distance, setback, and buffer limits in air quality standard permits would be evaluated on whether they meet those limits on the date new construction, expansion, or modification of the facility begins, or the date any application or notice of intent is first filed with the commission to obtain approval for construction or operation at the facility. Some examples of regulated entities that might benefit from the amendments include animal feeding operations, rock and concrete crushers, concrete batch plants, animal carcass incinerators, oil and gas facilities, and hot mix asphalt plants.

Because the revised statutes generally allow more flexibility and certainty for persons seeking to obtain certain standard permits and NSR permits, there may be some economic benefits as a result of the statutory changes. If applicants for qualifying NSR permits elect to take advantage of the flexibility provided by the proposed rules regarding the construction or modification of facilities, they may be able to take advantage of more favorable conditions that affect such activities. However, if the project failed to meet permit requirements, such as BACT, protection of human health, or other regulatory requirements, then substantial rework costs could be incurred after the fact. Applicants for standard permits affected by distance, setback, and buffer requirements would be less subject to subsequent events outside their control, thus reducing the risk that the holder of a standard permit would have projects disrupted by changing circumstances that may affect the viability of their projects. Once boundary limits are satisfied and a standard permit is issued, those requirements could not be changed to affect the authorized project construction or operation.

The proposed rules would not impose new technical or administrative requirements for regulated local governments, federal entities, or industries. Any economic benefits derived from greater flexibility or from applying greater consistency or more efficient application of regulations would depend upon a wide variety of circumstances and unique characteristics of a regulated entity and cannot be estimated reliably on a statewide basis.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more efficient and consistent application of permit requirements.

The proposed rules affect a wide number of entities and industries statewide, but would not impose new technical or administrative requirements. The proposed rules may provide some economic benefits to applicants for qualifying NSR permits regarding construction or modifications of facilities and to applicants for some standard permits affected by certain distance, setback, and buffer limits. Applicants for qualifying NSR permits could elect to take advantage of the flexibility afforded by the proposed rules and begin construction or modification of facilities before a permit is issued. Applicants for certain standard permits affected by distance, setback, and buffer limits would be provided with the certainty that their projects would not be affected by future circumstances. Any benefit from allowing for flexibility in construction or modification of facilities or from greater certainty or consistency in the application of regulations concerning distance and boundary limits would depend upon a wide variety of circumstances and unique characteristics of a regulated entity and cannot be estimated reliably on a statewide basis.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small or micro-businesses would experience the same flexibility and consistency under the proposed rules as that experienced by governmental entities, individuals, and large businesses concerning qualifying construction events and boundary/distance limits.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking action implements SB 1740, passed by the 79th Legislature, that created new THSC, §382.004 and amended §382.05195. The proposed amendments to §§116.110, 116.116, 116.710, 116.721, 116.787, 116.805, 116.820, 116.930, 116.1020, 116.1021, and 116.1424 would allow an applicant seeking a permit for a modification (or lesser change) to an existing facility to begin construction related to the application after the application is submitted, and before the commission has issued the permit. The decision to begin construction is at the applicant's own risk. The proposed amendment to §116.615 modifies how distance limits, setbacks, and buffers are evaluated at facilities authorized by an air quality standard permit. The amendments do not specifically protect human health or the environment.

The proposed amendments to Chapter 116 are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, these amendments implement SB 1740, passed by the 79th Legislature, that created new THSC, §382.004 and amended §382.05195, and therefore specifically meet an express requirement of state law. SB 1740 only authorizes construction to the extent permissible under federal law and therefore does not exceed a standard set by federal law. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not

developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.004, 382.017, and 382.05195. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of these proposed rules is to implement SB 1740, passed by the 79th Legislature, that created new THSC, §382.004 and amended §382.05195. The proposed amendments would substantially advance this stated purpose by changing sections of Chapter 116 to allow an applicant seeking a permit for a modification (or lesser change) to an existing facility to begin construction, at their own risk, related to the application after the application is submitted, and before the commission has issued the permit, and to modify how distance limits, setbacks, and buffers are evaluated at facilities authorized by an air quality standard permit.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules provide applicants for a modification to an existing facility, or a lesser change, the option to begin construction of the modification prior to receiving the authorization, and provide more clarity and certainty as to when a buffer or setback is to be determined for facilities subject to a standard permit. In addition, because the proposed amendments regarding start of construction prior to authorization are less stringent than existing rules, they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed revisions are necessary to ensure that commission rules maintain consistency with applicable statutes. The proposed revisions do not authorize or allow increased emissions of air contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed rules affect all sites, regardless of the applicability of the Federal Operating Permits Program. The proposed rules have no specific effect on federal operating permit sites.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 2, 2006, at 2:00 p.m., at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2005-052-116-PR. The comment period closes October 9, 2006. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.110, §116.116

STATUTORY AUTHORITY

These amendments are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which autho-

rize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, and 382.017.

§116.110. Applicability.

(a) Permit to construct. Except as provided under §116.116(g) of this title (relating to Changes to Facilities), before [~~Before~~] any actual work is begun on the facility, any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1) (No change.)

(2) satisfy the conditions for a standard permit under the requirements in:

(A) - (C) (No change.)

(D) Chapter 330[~~, Subchapter N~~] of this title (relating to Municipal Solid Waste [~~Landfill Mining~~]);

(3) - (5) (No change.)

(b) (No change.)

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or §116.116 of this title [~~(relating to Changes to Facilities)~~], compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E [~~C~~] of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR [~~Code of Federal Regulations~~] Part 63)) are not authorized to use:

(1) (No change.)

(2) standard permits under Subchapter F of this chapter that do not meet the requirements of Subchapter E [~~C~~] of this chapter; or

(3) §116.116(e) of this title [~~(relating to Changes to Facilities)~~].

(e) - (g) (No change.)

§116.116. Changes to Facilities.

(a) (No change.)

(b) Permit amendments.

(1) (No change.)

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission, except as provided in subsection (g) of this section. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter E [~~C~~] of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) (No change.)

(c) Permit alteration.

(1) (No change.)

(2) Requests for permit alterations that must receive prior approval by the executive director, except as provided by subsection (g) of this section, are those that:

(A) - (C) (No change.)

(3) - (5) (No change.)

(d) (No change.)

(e) Changes to qualified facilities.

(1) - (2) (No change.)

(3) The determination in paragraph (1) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of an [~~a~~] air contaminant category or compound above the allowable emissions for that air contaminant category or compound, the amount above the allowable emissions must be offset by an equivalent decrease in emissions at the same facility or a different facility. In making this offset, the following applies.

(A) - (F) (No change.)

(4) - (8) (No change.)

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.376(b)(1) [~~§101.29(d)(4)(v)~~] of this title (relating to Discrete Emission Credit Use [~~Banking and Trading~~]) if all applicable conditions of Chapter 101, Subchapter H, Division 4 [~~§101.29~~] of this title (relating to Discrete Emission Credit Banking and Trading) are met. This subsection does not authorize any physical changes to a facility.

(g) Construction while permit application pending.

(1) A person who submits an application for a permit amendment or permit alteration to authorize a modification of or a lesser change to an existing facility, or to authorize the addition of a new facility or facilities under an existing permit, may, at the person's own risk, begin construction related to the application after the application is received by the commission, and before the commission has issued the permit amendment or permit alteration.

(2) This subsection does not apply to requests, claims, registrations, or applications for a permit by rule or a standard permit.

(3) This subsection does not apply to any permit application for a project that would constitute a new major stationary source, or a major modification, as defined in §116.12 of this title (relating

to Nonattainment and Prevention of Significant Deterioration Review Definitions).

(4) The commission may not consider construction begun under this subsection in determining whether to grant the permit amendment or alteration sought in the application.

(5) Any facility constructed under this subsection shall not operate until the commission has issued a permit amendment or alteration authorizing the facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.615

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05195, concerning Standard Permit, which authorizes the commission to issue standard permits for new or existing similar facilities.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.011, 382.012, 382.017, and 382.05195.

§116.615. General Conditions.

The following general conditions are applicable to holders of standard permits, but will not necessarily be specifically stated within the standard permit document.

(1) Protection of public health and welfare. The emissions from the facility, including dockside vessel emissions, must comply with all applicable rules and regulations of the commission adopted under Texas Health and Safety Code, Chapter 382, and with the intent of the Texas Clean Air Act (TCAA) [~~TCAA~~], including protection of health and property of the public.

(2) (No change.)

(3) Standard permit in lieu of permit amendment. All changes authorized by standard permit to a facility previously permitted under §116.110 of this title [(~~relating to Applicability~~)] shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

(4) (No change.)

(5) Start-up notification.

(A) The appropriate air program regional office of the commission and any other air pollution control agency [~~program~~] having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by a standard permit in such a manner that a representative of the executive director may be present.

(B) (No change.)

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration, the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(D) (No change.)

(6) Sampling requirements. If sampling of stacks or process vents is required, the standard permit holder shall contact the commission's appropriate regional office [~~Office of Air Quality~~] and any other air pollution control agency [~~program~~] having jurisdiction prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission. The standard permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(7) (No change.)

(8) Recordkeeping. A copy of the standard permit along with information and data sufficient to demonstrate applicability of and compliance with the standard permit shall be maintained in a file at the plant site and made available at the request of representatives of the executive director, the United States Environmental Protection Agency [~~EPA~~], or any air pollution control agency [~~program~~] having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the standard permit holder in the standard permit registration. This information must include, but is not limited to, production records and operating hours. Additional recordkeeping requirements may be specified in the conditions of the standard permit. Information and data sufficient to demonstrate applicability of and compliance with the standard permit must be retained for at least two years following the date that the information or data is obtained. The copy of the standard permit must be maintained as a permanent record.

(9) Maintenance of emission control. The facilities covered by the standard permit may not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(10) Compliance with rules. Registration of a standard permit by a standard permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules, regulations, and

orders of the commission issued in conformity with the TCAA and the conditions precedent to the claiming of the standard permit. If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern. Acceptance includes consent to the entrance of commission employees and designated representatives of any air pollution control agency [~~program~~] having jurisdiction into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the standard permit.

(11) Distance limitations, setbacks, and buffer zones. Notwithstanding any requirement in any standard permit, if a standard permit for a facility requires a distance, setback, or buffer from other property or structures as a condition of the permit, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of:

(A) the date new construction, expansion, or modification of a facility begins; or

(B) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §116.710, §116.721

STATUTORY AUTHORITY

These amendments are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA.

The proposed amendments implement TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, and 382.017.

§116.710. Applicability.

(a) Flexible permit. A person may obtain a flexible permit that [~~which~~] allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Changes to Facilities [~~Amendments and Alterations~~]). A person may obtain a flexible permit under §116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account [~~before any actual work is begun~~], provided however:

(1) (No change.)

(2) modifications to existing facilities covered by a flexible permit may be authorized [~~handled~~] through the amendment of an existing flexible permit;

(3) permitting of a new facility may be authorized [~~handled~~] through the amendment of a flexible permit; and

(4) (No change.)

(b) - (d) (No change.)

§116.721. Amendments and Alterations.

(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit, as well as any general and special provisions attached, become conditions upon which the subsequent flexible permit is issued. It shall be unlawful for any person to vary from such representation or flexible permit provision if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in a significant increase in emissions, unless application is made to the executive director to amend the flexible permit in that regard and such amendment is approved by the executive director or commission, except as provided under §116.116(g) of this title (relating to Changes to Facilities). Applications to amend a flexible permit shall be submitted with a completed Form PI-1 and are subject to the requirements of §116.711 of this title (relating to Flexible Permit Application).

(b) Flexible permit alterations.

(1) (No change.)

(2) All flexible permit alterations which may involve a change in a general or special condition contained in the flexible permit, or affect control equipment performance must receive prior approval by the executive director, except as provided under §116.116(g) of this title. The executive director shall be notified in writing of all other flexible permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. The appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all flexible permit alteration documents.

(3) (No change.)

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. PERMITS FOR GRANDFATHERED FACILITIES
DIVISION 2. SMALL BUSINESS STATIONARY SOURCE PERMITS, PIPELINE FACILITIES PERMITS, AND EXISTING FACILITY PERMITS

30 TAC §116.787

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; §382.05183, concerning Existing Facility Permit, which allows existing facilities to apply for a permit; §382.05184, concerning Small Business Stationary Source Permit, which authorizes the commission to issue permits to small business stationary sources, as defined by TWC, §5.135; and §382.05186, concerning Pipeline Facilities Permits, which authorizes the commission to issue permits to reciprocating internal combustion engines that are part of pipeline facilities.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, 382.017, 382.05183, 382.05184, and 382.05186.

§116.787. Amendments and Alterations of Permits Issued Under this Division.

The owner or operator planning the modification of a facility permitted under this division relating to small business stationary source permits, pipeline facilities permits, and existing facility permits must comply with the requirements of Subchapter B of this chapter (relating to New Source Review Permits) before work begins on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities). Amendments and alterations for permits issued under this division are subject to the requirements of Subchapter B of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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DIVISION 3. EXISTING FACILITY FLEXIBLE PERMITS

30 TAC §116.805

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05183, concerning Existing Facility Permit, which allows existing facilities to apply for a permit.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, 382.017, and 382.05183.

§116.805. Amendments and Alterations for Existing Facility Flexible Permits.

The owner or operator planning a modification of a facility permitted under this division, relating to existing facility flexible permits, must comply with the requirements of Subchapter B of this chapter (relating to New Source Review Permits) before work begins on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities). Amendments and alterations for existing facility flexible permits are subject to the requirements of Subchapter B of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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For further information, please call: (512) 239-0348

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DIVISION 4. VOLUNTARY EMISSION REDUCTION PERMITS

30 TAC §116.820

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.0519, concerning Voluntary Emissions Reduction Permit, which authorizes the commission to issue permits to for certain existing unpermitted facilities.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, 382.017, and 382.0519.

§116.820. Modifications.

The owner or operator planning the modification of a facility permitted under a voluntary emission reduction permit must comply with Subchapter B of this chapter (relating to New Source Review Permits) before work is begun on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. ELECTRIC GENERATING FACILITY PERMITS

30 TAC §116.930

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05185, concerning Electric Generating Facility Permit, which authorizes the commission to issue permits for electric generating facilities that meet the requirements.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, 382.017, and 382.05185.

§116.930. Amendments and Alterations of Permits Issued Under this Subchapter.

The owner or operator planning a modification of a facility permitted under this subchapter must comply with Subchapter B of this chapter (relating to New Source Review Permits) before work is begun on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities). Amendments and alterations for permits issued in accordance with this subchapter are subject to the requirements of Subchapter B of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. MULTIPLE PLANT PERMITS

30 TAC §116.1020, §116.1021

STATUTORY AUTHORITY

These amendments are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which

authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05194, concerning Multiple Plant Permit, which authorizes the commission to issue a multiple plant permit for multiple plant sites that are owned or operated by the same person or persons under common control.

The proposed amendments implement TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, 382.017, and 382.05194.

§116.1020. Modifications.

The owner or operator planning the modification of a facility permitted under a multiple plant permit must comply with Subchapter B of this chapter (relating to New Source Review Permits) before work is begun on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities).

§116.1021. Amendments and Alterations.

(a) (No change.)

(b) Multiple plant permit alterations.

(1) (No change.)

(2) All multiple plant permit alterations which may involve a change in a general or special condition contained in the permit, or affect control equipment performance must receive prior approval by the executive director, except as provided under §116.116(g) of this title. The executive director shall be notified in writing of all other multiple plant permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any multiple plant permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.1011 of this title (relating to Multiple Plant Permit Application), including the protection of public health and welfare. The appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all multiple plant permit alteration documents.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0348

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SUBCHAPTER L. PERMITS FOR SPECIFIC DESIGNATED FACILITIES

30 TAC §116.1424

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.004, concerning Construction While Permit Application Pending, which allows a person who submits an application for modification to an existing facility or lesser change to begin construction at their own risk prior to issuance of the permit; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA.

The proposed amendment implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.004, 382.011, 382.012, and 382.017.

§116.1424. Amendments and Alterations of Permits Issued Under this Subchapter.

The owner or operator planning the modification of a facility permitted under this subchapter must comply with the requirements of Subchapter B of this chapter (relating to New Source Review Permits) before work begins on the construction of the modification, except as provided under §116.116(g) of this title (relating to Changes to Facilities). Amendments and alterations for permits issued under this subchapter are subject to the requirements of Subchapter B of this chapter, except that the public notice and public participation requirements of this subchapter shall apply instead of any public notification or public comment procedures required by Subchapter B of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE
SUBCHAPTER B. CONCENTRATED ANIMAL FEEDING OPERATIONS

30 TAC §321.43

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §321.43.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Senate Bill (SB) 1740, passed by the 79th Legislature, 2005, affects several aspects of air permitting. Section 1 of SB 1740 created new Texas Health and Safety Code (THSC), §382.004, Construction While Permit Application Pending. Section 382.004 allows an applicant seeking a permit for a modification (or lesser change) to an existing facility to begin construction related to the application after the application is submitted, and before the commission has issued the permit.

Section 2 of SB 1740 amended THSC, §382.05195, Standard Permit, to modify how distance limits, setbacks, and buffers are evaluated at facilities authorized by an air quality standard permit. Under new THSC, §382.05195(j), if a standard permit requires a distance limit, setback, or buffer from other properties or structures, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

A revision to Chapter 321 is necessary to maintain consistency between the new statutory requirements and commission rules concerning distance limits, setbacks, and buffers. The proposed rule would revise §321.43 to incorporate the new distance limit, setback, and buffer zone provisions of THSC, §382.05195(j) into the Air Standard Permit for Animal Feeding Operations (AFOs).

The commission is also proposing a concurrent rulemaking to 30 TAC Chapter 116 in this issue of the *Texas Register*.

SECTION DISCUSSION

§321.43. Air Standard Permit for Animal Feeding Operations (AFOs).

The commission proposes a revision to §321.43(j)(2)(A) to implement THSC, §382.05195(j). Under the proposed rule, the determination of whether the applicable buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility. Minor administrative changes are also proposed to conform with Texas Register requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Local governments or other governmental entities owning or operating AFO facilities may experience some economic benefit as a result of the proposed rule. The proposed rule would implement the provisions of SB 1740, dealing with the distance, setback, and buffer limits at AFOs that apply for an air quality standard permit.

The proposed rule would amend Chapter 321 specifically concerning the air standard permit for AFOs. A concurrent rulemaking proposes amendments to Chapter 116, which also deals with distance, setback, and buffer limits for other air quality standard permits. Amendments to Chapter 321 would establish that buffer requirements for AFOs would be satisfied for the purposes of a standard permit at the earlier of the date new construction, expansion, or modification of the facility begins or the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of a facility. This would ensure that standard permit projects could continue if subsequent events outside the control of the permit holder occur, thereby reducing the risk that the owners/operators of AFOs would have projects disrupted by changing circumstances. Once boundary limits are satisfied, those requirements could not be changed in future periods to affect project construction or operation.

The proposed rule would not impose new technical or administrative requirements on AFOs. However, the proposed rule may provide an economic benefit because it affords AFO owners and operators with more certainty regarding their projects. Any statewide economic benefit to AFOs could not be reliably estimated given the varied characteristics and conditions under which each AFO operates.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and more efficient and consistent application of permit requirements.

The proposed rule would not impose new technical or administrative requirements, but some AFOs may experience an economic benefit since the proposed rule does provide for more predictability and certainty for standard permit holders. Once buffer limits are satisfied and a standard permit is issued, those requirements could not be changed in future periods to affect project construction or operation.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small or micro-businesses owning or operating AFOs would experience the same certainty and consistency under the proposed rule as that experienced by governmental entities, individuals, and large businesses concerning buffer limits for air quality standard permits.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action

does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking action implements Section 2 of SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195 to add new subsection (j). The proposed amendment to §321.43 implements this new subsection for the AFO air standard permit to modify how distance limits, setbacks, and buffers are determined at these facilities. The amendment does not specifically protect human health or the environment.

The proposed amendment to Chapter 321 is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, this amendment implements SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195 and therefore specifically meets an express requirement of state law. Section 2 of SB 1740 only establishes the timing for the determination of property line distance, buffers, or setbacks under state air standard permits, and therefore does not exceed a standard set by federal law. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.017, and 382.05195. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendment and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of this proposed rule is to implement Section 2 of SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195. The proposed amendment would substantially advance this stated purpose by changing §321.43 to modify how the buffer requirement is evaluated at AFOs authorized by an air quality standard permit.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule provides applicants for an AFO standard permit more clarity and certainty as to when the buffer requirement is to be determined. Therefore, this rule will not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed revisions are necessary to ensure that commission rules maintain consistency with applicable statutes. The proposed revisions do not authorize or allow increased emissions of air contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed rule affects all sites, regardless of the applicability of the Federal Operating Permits Program. The proposed rule has no specific effect on federal operating permit sites.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 2, 2006, at 2:00 p.m., at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2005-052-116-PR. The comment period closes October 9, 2006. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

STATUTORY AUTHORITY

This amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05195, concerning Standard Permit, which authorizes the commission to issue standard permits for new or existing similar facilities.

The proposed amended section implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.011, 382.017, and 382.05195.

§321.43. Air Standard Permit for Animal Feeding Operations (AFOs).

(a) - (g) (No change.)

(h) Dual authorization. No person may concurrently hold both an individual permit under Chapter 116 of this title and authorization under this air standard permit for the same AFO and associated facilities. This does not preclude the operator from holding individual permits or other applicable authorizations for facilities not authorized by this air standard permit.

(i) (No change.)

(j) Requirements for air standard permit authorization. AFOs shall meet the following requirements.

(1) (No change.)

(2) Buffer requirements. The buffer requirements in the following table apply to all of the requirements in subparagraphs (A) - (F) of this paragraph.
Figure: 30 TAC §321.43(j)(2) (No change.)

(A) The determination of whether the applicable buffer requirements are [~~shall be~~] satisfied shall be made on the basis of conditions existing at the earlier of [~~at the time that the AFO operator does any of the following~~]:

(i) the date new construction, expansion, or modification of a facility begins; or

(ii) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

~~*[(i)*~~ ~~claims authorization under the air standard permit for an AFO already in operation;]~~

~~*[(ii)*~~ ~~begins construction of a new AFO; or]~~

~~*[(iii)*~~ ~~begins construction for expansion or modification of an AFO already in operation by performing activities including, but not limited to, increasing the maximum number of animals confined under the water quality authorization, constructing new pens, or constructing or modifying RCSs.]~~

(B) - (C) (No change.)

(D) Written consent, including a letter as defined by §321.32(26) of this title [~~(relating to Definitions)~~], easement, or lease agreement specifically consenting to location and operation of permanent odor sources at an AFO within the required minimum buffer distance in this paragraph from the owner of the land containing each occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park located within the buffer distance may be obtained in lieu of satisfying the buffer distance requirements in this paragraph. Written consent from the governmental entity responsible for operating a school or public park, if the governmental entity is not the owner of the land containing the receptor, is required in addition to the consent of the owner of the land containing the receptor. An easement must be recorded with the county. The written consent must include the following information at the time the actions specified in this paragraph occur:

(i) - (vi) (No change.)

(E) - (F) (No change.)

(3) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 350. TEXAS RISK REDUCTION PROGRAM

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§350.2 - 350.4, 350.33, 350.34, 350.37, 350.51, 350.54, 350.71, 350.73 - 350.77, 350.79, 350.91 - 350.96, 350.111, and 350.134, and proposes a new §350.90.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The initial rulemaking of Chapter 350 was originally adopted on September 2, 1999, and became effective September 24, 1999. The purpose of the original rulemaking was to create a unified performance-based remediation program that is risk-based, consistent, streamlined, and that expedites site remediations. Subsequent to the initial adoption, the rulemaking has been readopted under the Quadrennial Review requirements. In August 2003, §350.1 was modified to include a provision to confirm that engineering, geoscience, and surveying information submitted to the agency must comply with the applicable professional licensing and registration Acts. Other than that, the rule has remained unchanged since its original adoption.

The agency has gained much experience over the last seven years through intensive implementation of the rule at thousands of contamination sites located throughout Texas. The agency has noticed errors (misspellings, typographical, mathematical) in the rule that need to be corrected, as well as provisions that either need clarification or modification to facilitate consistent and effective rule application. Additionally, the agency has reevaluated some policy positions reflected in the current rules and desires to modify the rules in light of that, or has developed new positions and procedures in guidance that were previously unaddressed by the rules, but are now ripe for inclusion in the rules. Finally, the agency is proposing new rule provisions in support of a new electronic data management system initiative and expanded use of geographical information system technology to increase agency effectiveness and institutional memory as well as to improve the public availability of technical information stored at the agency. For all of these reasons, these amendments are proposed.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are proposed throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The name of the agency has changed from Texas Natural Resource Conservation Commission (TNRCC) to Texas Commission on Environmental Quality (TCEQ) since the adoption of the current rule. Therefore, changes are proposed to §§350.4(a)(58) and (b), 350.73(a)(4) and (b), and 350.111(a)(7) and (8) and (c), as well as to Figures 30 TAC §§350.73(e), 350.74(a), and 350.77(b) to reflect this agency name change.

Proposed §350.2(g), Applicability, is amended to provide the agency the latitude to grant a variance that will foster regulatory consistency between neighboring leaking petroleum storage tank (LPST) sites that have comparable conditions. As explained in the March 26, 1999, issue of the *Texas Register* (24 TexReg 2208) preamble to the proposed rulemaking, one reason this chapter was adopted was to create greater uniformity between regulatory programs, and thus between remediation sites. However, because of the large number of LPST sites that have been remediated under the 30 TAC Chapter 334 regulations, the application of this chapter to an LPST site has sometimes had the opposite effect, resulting in regulatory inconsistency with comparable neighboring LPST sites that have been regulated under Chapter 334.

Therefore, these provisions are proposed in order to enable the executive director the discretion to grant a site-specific variance to use the Chapter 334 regulations in lieu of this chapter in certain instances. These proposed amendments provide criteria that must be met to be eligible to request the variance. Most importantly, there must be neighboring LPST sites that are regulated under the Chapter 334 risk-based corrective action regulations, and the regulatory requirements for those sites must be substantially different from what is required by this chapter, even though the site conditions, release conditions, and receptor conditions are comparable.

If the person can demonstrate that Chapter 334 requirements apply to neighboring and comparable LPST sites, and that to comply with this chapter unjustifiably imposes greater requirements, the person will be able to formally submit a request for a variance as set forth in these amendments. The person is responsible for initiating the variance request and for providing all information required under these amendments and for supplying any additionally requested information that is reasonable and appropriate. The requested variance will be granted if the executive director agrees with the person that the sites are neighboring and comparable, and an unjustifiable difference in requirements will result if this chapter is applied to the LPST site. With the variance, the person will then apply the Chapter 334 risk-based corrective regulations in lieu of this chapter.

However, the agency has chosen to allow this variance only for LPST sites that ceased aboveground or underground storage tank use before September 1, 2003, the effective date of this chapter for LPST sites. Further, the variance is only for those properties and future subdivisions of those properties where the landowner voluntarily commits to impose a permanent prohibition against any future aboveground or underground storage tank use at that property by means of a restrictive covenant enforceable by the State of Texas. In the opinion of the agency, these criteria ensure any LPST releases that will qualify for this variance are constrained to those releases that occurred prior to the date Chapter 350 became effective for LPST sites. This ensures that the application of Chapter 334 will be allowed only for legacy situations that occurred prior to the effective date of this chapter. Any release occurring or potentially occurring after that date as a consequence of storage tank system operation after that date, should, in the opinion of the agency, be regulated under Chapter 350. Further, the agency believes if compliance with Chapter 350 does not create regulatory inconsistency with obligations under Chapter 334, then the variance is not warranted and compliance with Chapter 350 is fully appropriate.

If in the future the landowner of the property or subdivision of the property desires to resume storage tank use at the property or subdivision of the property, then the LPST release for which the variance was granted must be brought into full compliance with this chapter at that time.

Proposed §350.2(m), concerning the use of this chapter on or after May 1, 2000, would clarify provisions regarding switching rules once the person established grandfather status under the previous rules of 30 TAC Chapter 335, Subchapters A and S (Industrial Solid Wastes and Municipal Hazardous Wastes in General; Risk Reduction Standards, respectively). These provisions specify that, first, a person who desires to remain subject to Chapter 335 risk reduction standards may not use any provisions of Chapter 350 and that, second, a person who switches to Chapter 350 to complete a response action may not revert back to Chapter 335. As originally structured, the second provision would appear to apply only to risk reduction standard number 3. By deleting these two provisions from subsection (m)(1) and (2) and adding them to subsection (m), the provisions will apply uniformly to all three risk reduction standards of Chapter 335.

Proposed §350.3, Process, would modify flowcharts that describe the sequence and timing for reporting to the agency. The proposed changes to the flowcharts correct typographical errors and more accurately summarize the existing rule. The amendment would clarify that documentation of any required institutional controls related to Remedy Standard A must be submitted within 90 days of agency approval of a Response Action Completion Report, and clarify that proof of compliance with institutional control requirements must be submitted within 120 days of agency approval of a Response Action Plan, if a waste control unit, technical impracticability demonstration, and/or plume management zone is used. The proposed changes neither alter nor add requirements to the existing institutional control and reporting requirements.

Proposed §350.4, Definitions and Acronyms, would include proposed revisions to correct typographical errors, revisions to the definitions for "Background," "Commercial/industrial land use," "Implementation Procedures," "Person," and "Surface soil," changing the term "Sample quantitation limit" to "Sample detection limit," and adding the acronym "TPDES" (Texas Pollutant Discharge Elimination System).

Proposed §350.4(a)(6), concerning the definition of "Background," would add diffuse non-point source pollution in surface water and sediment as an example of anthropogenic background. Anthropogenic background conditions arise as a result of human activities, as opposed to conditions that are naturally occurring. An example of an anthropogenic background condition is a large area of relatively low-level concentrations of lead in soils that resulted from past automobile emissions. People are not required to perform response actions to address anthropogenic background conditions. The reason for proposing the addition is to make it clear that the agency will consider non-point source pollution as a possible anthropogenic background argument for surface water and sediment.

Non-point source pollution occurs when precipitation or irrigation water runs over land or through the ground, picks up pollutants, and carries them away into water bodies. Technically, the term "non-point source" means any source of water pollution that is not a point source, i.e., any discernible, confined and discrete conveyance including, but not limited, to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. Although diffuse runoff is generally treated as non-point source pollution, runoff that enters and is discharged from conveyances such as those described above is considered a point source discharge.

Typical examples of non-point source pollution include fertilizers/nutrients, herbicides, and insecticides in urban and rural storm runoff, oil, grease, and toxic chemicals in urban storm runoff, runoff from roads and highways, and atmospheric deposition of emissions (e.g., motor vehicle and machinery emissions). Anthropogenic background must be primarily associated with non-point source pollution from diffuse sources, cannot be related to specific activities conducted at an affected property, and cannot be related to other point sources or releases from the affected property or nearby industrial facilities. Chemical of concern (COC) characteristics typical of anthropogenic background should be present uniformly throughout a water body or throughout a larger section of the water body than the area potentially impacted by the facility in question. Persons should also attempt to demonstrate that the proposed anthropogenic background is not a result of point source discharges from Texas Pollution Discharge Elimination System (TPDES) permitted industrial or domestic wastewater treatment plants. Discharges associated with municipal separate storm sewer systems that are governed by a TPDES (or National Pollution Discharge Elimination) storm water permit include runoff that contains COCs from a multitude of point and non-point sources. Undoubtedly, such urban runoff may contain point source releases of wastes or products or industrial activities, and/or the storm water is finally discharged from a point source. Both cases will not clearly meet the definition of anthropogenic background. However, the agency desires to avoid the situation where a person is tasked with disproving the potential for urban runoff to contain a discrete COC source before the agency will agree to an anthropogenic background definition for purposes of a particular project. Therefore, purely for the purposes of expediting these projects where COC concentrations are attributable to point source urban runoff, persons will not be asked to prove that the urban runoff strictly satisfies the anthropogenic background definition. It should be noted that the Texas Risk Reduction Program (TRRP) rule already states that anthropogenic background "is not the result of specific use or release of waste or products, or industrial activity." Therefore, the agency may reject the anthropogenic background proposal where there is obvious contradiction to the intent of the rule, which is why the agency is proposing the addition of the word "might" as a qualifier to the examples of anthropogenic sources. Examples of unacceptable proposals include situations where the COC concentration is attributable to a known or suspected unauthorized discharge or from activities at the on-site affected property or adjacent properties, or there is a clear, significant waste or industrial contribution.

The proposed addition of this text as an example of anthropogenic background clarifies that persons opting to make a sediment background proposal will be expected to make a reasonable attempt to distinguish between affected property impacts and those attributable to widespread, diffuse anthropogenic pollutants in sediments and surface water. The agency will not entertain the presumption that sediments (and surface water) in an industrial/urban area are already impacted by non-point source pollution, as a rationale to preclude sampling affected property sediments (and surface water) or attempting to establish natural or anthropogenic background (where this is desired).

Proposed §350.4(a)(13), concerning the definition of "Commercial/industrial land use," would clarify that the hiring of domestic household help at a property does not result in the land use of that property being considered commercial/industrial under the TRRP rule. The current definition indicates that land use activities consistent with commercial/industrial land use include North American Industrial Classification System (NAICS) Code 814, which relates to the use of domestic help in a private household. The proposed change excludes NAICS Code 814.

Proposed §350.4(a)(45), concerning the definition of "Implementation Procedures," would correct a reference to an agency document. The rule currently defines "Implementation Procedures" when used in the TRRP rule as referring to the agency document "Implementation of the Texas Natural Resource Conservation Commission Standards via Permitting." While "Implementation of the Texas Natural Resource Conservation Commission Standards via Permitting" is an actual agency document referred to in the TRRP rule, it is not applicable to the situations being discussed in the rule when the term "Implementation Procedures" is referenced. The correct document to use when "Implementa-

tion Procedures" is referenced in the rule is entitled "Procedures to Implement the Texas Surface Water Quality Standards."

Changes are proposed to §350.4(a)(62), relating to the definition of "Person." The current definition excludes "a governmental entity that is not a responsible party performing a remedial action" from the definition of "Person." The agency has determined that the current definition is too broad with regard to governmental entities, in that it unintentionally implies that remediation projects conducted by a governmental entity are not regulated by the TRRP rule. The current definition of the existing rule was intended, in part, to provide relief for a governmental entity which is performing a remedial action but is not a responsible party, such as governmental entities remediating brownfields properties, or performing State Lead PST or Superfund remediation, from being required to obtain: a) a restrictive covenant in the situation where the landowner refuses to execute the covenant; or b) the written consent from a landowner prior to filing a deed notice or Voluntary Cleanup Program certificate of completion on that landowner's property. Given the potential for overbroad application of the definition of "Person," the definition is narrowed and the related proposed changes to §350.111(c) specifically address this requirement more suitably.

Proposed §350.4(a)(78), concerning the definition of "Sample quantitation limit," would replace the word "quantitation" with "detection" in order to better fit the definition provided in the rule. Conforming changes are also proposed for §§350.51(d)(1) and (n), 350.54(h)(2), 350.71(k)(1), and 350.79.

Proposed §350.4(a)(88), concerning the definition of "Surface soil," would revise the current definition of surface soil with respect to human health considerations. The proposed changes would define surface soil for both residential and commercial/industrial land use, as the soils extending from ground surface to five feet in depth, or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth for both residential and commercial/industrial land uses. For residential land use, surface soils are currently defined as the soils extending from ground surface to 15 feet in depth, or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth. For commercial/industrial land use, surface soils are currently defined as the soils extending from ground surface to five feet in depth, or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth. The significance of the proposed change is that for residential land use, human exposure to soils containing COCs at depths greater than five feet below ground surface will no longer be considered in the same fashion. Under the current surface soil definition, the protective concentration level (PCL) for the combined human health exposure pathways of dermal contact with and ingestion of the soil COCs, ingestion of vegetables grown in the soil COCs, and inhalation of volatile and particulate COC emissions from the soils (i.e., $^{Tot}Soil_{Comb}$) applies from ground surface to 15 feet in depth. With this proposed change, only human exposure to volatile emission of COCs from the five feet to 15 feet depth interval will still be evaluated (i.e., $^{Air}Soil_{Inh\text{-}V}$). The $^{Tot}Soil_{Comb}$ PCL will only apply from ground surface to five feet in depth. The proposed changes to the definition of surface soils are intended to reduce the complexity of applying the TRRP rule.

At Tier 1, the critical PCLs, i.e., the lowest PCL applicable for a particular COC and environmental medium, for the vast majority of COCs is the soil-to-groundwater PCL that is set to safeguard for ingestion of groundwater (i.e., $^{GW}Soil_{Ing}$). This means that at Tier 1, soil response actions are driven by the need to protect the underlying groundwater rather than by human health exposure concerns. The $^{GW}Soil_{Ing}$ PCLs are applicable throughout both the surface and subsurface soils. At those affected properties, the proposed change to the definition of surface soil will have no effect on response actions to address COC impacts at Tier 1.

However, for some COCs the critical PCL at Tier 1 is the $^{Tot}Soil_{Comb}$ PCL. Also, when Tier 2 or 3 $^{GW}Soil_{Ing}$ PCLs are established, and the underlying groundwater is Class 3, a plume management zone is applied, or a certified municipal setting designation (MSD) is applied, the $^{Tot}Soil^{Comb}$ PCL frequently becomes the critical PCL for surface soil.

The agency believes that the existing practice of defining surface soil differently for residential and commercial/industrial land uses has led to a perhaps unnecessarily complicated application of the TRRP rule in some cases. This is due in part to the TRRP rule requirement that all COCs, including those being addressed at commercial/industrial facilities, are required to be horizontally delineated to residential assessment levels (surface soil is ground surface to 15 feet in depth). However, when subsequently setting surface soil PCLs, the commercial/industrial definition for surface soil can be used for commercial/industrial properties (ground surface to five feet in depth). It should be noted that the proposed changes will not remove the requirement to use assessment levels appropriate for residential land use for the delineation of COCs, but the proposed changes will allow the use of the same depth definition for surface soil at both residential and commercial/industrial properties. This proposed change is intended to make the implementation of the TRRP rule less complicated and more streamlined for both the regulated community and staff.

In addition to the considerations described in preceding paragraphs, when considering the proposed changes to the definition of surface soils agency staff gave weight to the fact that the current United States Environmental Protection Agency (EPA) definition of surface soils with respect to direct exposure by humans does not exceed the 0 to five feet below ground surface soil interval for commercial/industrial or residential land use. Staff also considered the likelihood of exposure to soils deeper than five feet below ground surface (i.e., that soils excavated for the installation of things such as swimming pools and building piers will either be removed or covered with top soil that is suitable for landscaping purposes).

The commission is requesting comments on the proposal to revise the surface soils definition for residential land use, with regard to human health concerns, as the soils extending from ground surface to five feet in depth, or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth.

Proposed §350.33(f)(4)(E), Remedy Standard B, is amended to clarify the current rule and by replacing clause (i), concerning recovery of readily recoverable nonaqueous phase liquids (NAPLs) within a plume management zone with a general requirement that the remaining NAPL will not result in unacceptable risk to human health and the environment. The original intent of the rule was to only require "readily recoverable NAPLs" to be removed when warranted by site conditions, not to require "readily recoverable NAPLs" to be removed at all sites. As stated in the adoption preamble as published in the September 17, 1999, issue of the *Texas Register* (see 24 TexReg 7546): *The agency does prefer that identified NAPLs be removed or treated. However, the agency also recognizes that controls may be appropriate, particularly if the NAPL cannot be sufficiently ad-*

dressed such that there is a net environmental benefit. Therefore, in the implementation of these rule provisions, the initial premise is that the NAPLs must be removed to the extent practicable; however, flexibility is provided by which the person can make a demonstration that the remaining NAPLs do not represent a significant long term threat to human health and the environment. The amendment modifies the rule to meet this original intent and clarifies the minimum criteria by which persons can evaluate the appropriateness of leaving NAPLs in place.

Proposed §350.34(1) and (2), No Further Action, would specify other rule requirements that may trigger the need for an institutional control.

Proposed §350.37(i) and (k), Human Health Points of Exposure, is amended to correct and clarify the rule. The amendment factors in impacts to downgradient reaches of the surface water body, and establishes the point of exposure (POE) for intermittent streams.

Proposed §350.51(d), Affected Property Assessment, would correct and clarify the rule so that it is fully consistent with the intent behind the rule provision. The goal of the provision is to ensure that the key question of whether groundwater has been affected by a COC release is specifically answered. The existing rule requires that the vertical extent of the release be investigated to the greater of the method quantitation limit or to the background concentration, or until groundwater is encountered, in which case the groundwater will be sampled. When groundwater has already been investigated, the rule softens the vertical assessment required by allowing the vertical assessment to terminate at the ^{GW}Soil PCL. That reference to ^{GW}Soil in §350.51(d)(1) was incorrectly too specific, and should have instead more generally stated "the assessment level."

Also, proposed §350.51(d)(1) is amended into additional paragraphs (2) and (3) to enhance readability, and the existing paragraph (2) would be renumbered to paragraph (4). In paragraph (2), an amendment is proposed to clarify that in the context of using §350.75(i)(7)(C) to limit the vertical assessment under §350.51(d), groundwater assessment data must be available, except in the following extreme geologic situations: the depth to groundwater is great, the potential for the geology to prevent the COCs from reaching the groundwater is great, or the "soil" is actually rock (and thus there may not be a good or feasible way to collect and analyze a soil sample that will yield representative soil COC concentrations). For those situations, it is proposed to provide the agency authority to grant an exception to the need for groundwater data.

Proposed §350.51(i) is amended concerning the records survey required for the affected property assessment. The most recent affected property assessment report (APAR) form requests that the person research whether areas within 1/2 mile of the outer extent of affected groundwater are serviced by, or connected to, a public water supply. The TCEQ requests this information in order to comply with the requirements of Texas Water Code (TWC), §26.408, codified from House Bill 3030 and passed by the 78th Legislature, 2003. This legislation requires that the TCEQ, within 30 days of receiving a report of groundwater contamination, identify any private drinking water wells that may be threatened by the groundwater, and notify the well owners that their water supplies are or may be contaminated. The agency therefore requests this information in the APAR form.

Proposed §350.51(j), concerning the collection of representative samples of groundwater, would involve revising the text to reflect the fact that samples collected from any environmental medium (not just groundwater) should be collected and handled in a manner which will yield representative concentrations of COCs.

Proposed §350.51(k), concerning collecting representative samples of surface water, would revise the text to reflect the fact that samples collected from either surface water or sediment should be collected and handled in a manner which will yield representative concentrations of the COCs in those two media. Another proposed change is to refer to a different, more complete guidance document for surface water/sediment collection. For this change, *Implementation Procedures* is proposed to be deleted, and *Surface Water Quality Monitoring Procedures, Volume I* is proposed to be used in its place.

Proposed §350.51(m), concerning site-specific background soil concentrations, would add the word "soil" into the rule to clarify that the Texas-specific background concentrations are for soil. Proposed changes to Figure: 30 TAC §350.51(m), entitled, "Texas-Specific Background Concentrations," include amending the title to include the word "soil" as the table pertains exclusively to soils, not groundwater or other media; and also amending the title to include the units of milligrams per kilogram (mg/kg). In addition, it is proposed to amend the reference to fluorine to fluoride, since fluoride is the correct form of the element that should be listed in the table. Finally, the table has been corrected to reflect thorium instead of thallium, as it was mistakenly portrayed as thallium in the original rule, and had been previously corrected in guidance.

A footnote is proposed for additional clarification to the figure in §350.51(m). It references the document which is the source of the table data: *Background Geochemistry of Some Rocks, Soils, Plants, and Vegetables in the Conterminous United States*, by Jon J. Connor, Hansford T. Shacklette, *et al.*, Geological Survey Professional Paper 574-F, U.S. Geological Survey.

Proposed §350.54(d), Data Acquisition and Reporting Requirements, is amended to revise the laboratory accreditation requirements to be consistent with 30 TAC Chapter 25, Environmental Testing Laboratory Accreditation and Certification. The new requirements will be implemented on July 1, 2008. The proposed changes to the existing rule clarify the requirements for data generated prior to the implementation of the amended rule. Also proposed is an amendment to §350.54(e)(4) to clarify that method detection limits are not analyst dependent.

Proposed §350.71(k), General Requirements, is amended to simplify and clarify the existing rule. To facilitate this, proposed paragraph (4), is added and is referenced in subsection (k). Additional text is proposed to be added to paragraph (1) to add specific context that clarifies the intent of the rule to facilitate consistent rule application. Additional text is also proposed for paragraph (2) to clarify that the residential assessment level is the analytical performance criteria to screen COCs from PCL development under this paragraph. Furthermore, the additional text makes paragraph (2) self-contained, eliminating the prior need to also apply paragraph (3) when applying paragraph (2). The proposed amendment to paragraph (3) would greatly shorten and simplify the rule language by deleting subparagraphs (A) and (B)(vi). In short, now under paragraph (3) if a COC is not detected in excess of the residential assessment level, even though it is anticipated to be present at the facility, it can be dropped from PCL development. Proposed paragraph (4) would clarify that a COC that is not anticipated to be associated with a facility or site activities can be dropped from PCL development when it is not detected. Note that the residential

assessment level is intentionally not included in paragraph (4) to address the frequent situation where a broad spectrum analytical method is used during the assessment, but some of the analytes reported from the analysis are not associated with the facility and the sample detection limits for those analytes exceed the residential assessment level. Under the existing rule, those analytes need to be reanalyzed using a method with a reporting level at or below the residential assessment level. This rule amendment will allow those analytes to be dropped from PCL development when they are not detected at the detection limit for that broad spectrum method.

Proposed §350.73, Determination and Use of Human Toxicity Factors and Chemical Properties, would include revisions to §350.73(a) to add a new source to the list of acceptable sources for obtaining human toxicity factors, and a proposed change to require the use of the most recent chronic human toxicity factors, instead of the current approach of requiring that the sources in the list be used in a certain order. The proposed new source of toxicity factors is EPA Provisional Peer Reviewed Toxicity Values (i.e., Superfund Health Risk Technical Support Center). The changes are proposed because two of the sources in the list, the "EPA Health Effects Assessment Summary Table" and the "EPA National Center for Environmental Assessment," will no longer have updates to toxicity factors, however, it will likely take a number of years for new toxicity factors to be developed to replace some of the values that are in those sources. The proposed changes will allow the continued use of any of the sources that are currently in the TRRP rule, so long as the source contains the most recent toxicity factor. A change is proposed to §350.73(b) to remove a sentence that will be unnecessary if the proposed changes to §350.73(a) are approved, because all toxicity factors will be required to be the most recent available factors.

Changes are proposed to Figure: 30 TAC §350.73(e) to reflect current available chemical and physical data for 2-ethoxy ethanol (Table Compound No. 172).

Proposed §350.73(e)(1) would remove incorrect references to leachate tests, including the Synthetic Precipitation Leaching Procedure (SPLP), as appropriate tests for determining the soil-water partition coefficient (K_d) of inorganic compounds or the organic carbon-water partition coefficient (K_{oc}) of ionizing organic compounds. The changes are proposed because leachate tests such as SPLP are not appropriate for determining the partitioning coefficients. The proposed changes would continue to allow the use of data from appropriately conducted tests to be used to determine a site-specific K_d or K_{oc}.

Changes are proposed to Figure: 30 TAC §350.73(e)(1)(C) to add pH-dependent soil-water partition coefficients (K_d) for antimony and a revised single value for vanadium.

Figure: 30 TAC §350.74(a), entitled "Risk-Based Exposure Limit Equations and Default Exposure Factors for Residents," is proposed to be amended to correct the reference concentration (RfC) citation for the relative bioavailability factor (RBAF) from §350.74(j)(1)(D) to §350.74(j)(1)(C). It is also proposed to delete the TNRCC Chronic Remediation-Specific Effects Screening Level values referenced in the figure, to conform with proposed revisions to §350.73.

Proposed §350.74(h), concerning the surface water risk-based exposure limit (^{SW}RBEL), would include new language to make persons more aware that they may have to develop multiple RBELs or PCLs depending on the distance downstream COCs are expected to be present in the watershed, and that the RBELs and PCLs will vary with the different uses and exposure pathways within the watershed.

Proposed §350.74(h)(2) would add contact recreation as a water body use that the person must consider when applying human health criteria to establish ^{SW}RBELs. Adding contact recreation as a water body use acknowledges the fact that incidental ingestion of surface water and dermal contact with surface water sometimes occurs, and therefore, may be pathways of exposure to COCs, even when a water body is not a drinking water source.

Proposed §350.74(h)(3) would replace "limits" with "effluent limitations" to be more technically accurate. Also, the reference to 30 TAC Chapter 321, Subchapter H, is proposed to be changed to Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXG830000, because the existing reference is no longer valid.

Proposed §350.74(h)(4) is amended to spell out "United States" rather than use the abbreviation "U.S.". In addition, language that clarifies the meaning of the term "federal guidance criteria" is proposed to be added.

Section 350.74(h)(5) is proposed to be added- elevated from the former §350.74(h)(6)(B). Elevation of this subsection emphasizes the fact that the specified analytes (chlorides, sulfates, et al.) should be treated as COCs.

Because of the additions previously discussed, §350.74(h)(6) becomes §350.74(h)(7), and §350.74(h)(7) becomes §350.74(h)(8). Also, proposed §350.74(h)(7) would clarify the fact that some parameters (nutrients, TDS, etc.) are sometimes COCs themselves.

Changes are proposed to the groundwater-to-surface water PCL equation contained in Figure: 30 TAC §350.75(b)(1) to clarify that ecological receptors must be considered when determining PCLs for groundwater discharges to surface water. The term currently in the numerator of the equation (^{SW}RBEL) is only related to aquatic life and human health exposure pathways that are addressed by the Texas Surface Water Quality Standards (TSWQS). The proposed new term for the numerator of the equation, the PCL for surface water (^{SW}SW), takes ecological receptors into consideration (including aquatic life) and other human pathways not addressed by the TSWQS, as described in later discussions of proposed changes to this section of the TRRP rule.

Changes are proposed to Figure: 30 TAC §350.75(b)(1) to correct the missing temperature term "K" for the units for the Universal Gas Constant in two places in the figure, and to update the amount of time that an individual is assumed to be exposed to a chemical or multiple COC (i.e., the exposure interval). The exposure interval value is used when performing certain calculations used to determine risk-based values. To reflect more recently published EPA information, it is proposed to change the exposure interval(s) value to 9.5×10^8 seconds (30 years). The value currently used in the rule is 1.0×10^9 (33 years). This change has already been addressed and implemented in guidance. Another proposed change to the figure is to replace incorrect cross-references to tables that are supposed to contain "Soil organic carbon-water coefficient" values (i.e., K_{oc} values) with the correct cross-reference. The cross-references proposed for deletion refer to tables containing K_d values, instead of K_{oc} values. An additional proposed change to the figure corrects the definition of the term "LDF," changing it from "Lateral Dilution Factor" to "Leachate Dilution Factor," to better represent the fact that

the dilution factor is used in calculations for predicting the concentrations of a COC contained in groundwater after it leaches through soils containing that COC and dilutes in the groundwater. It is also proposed to change the equation for calculating "The residential saturation limit where NAPL becomes mobile" to show the term "θ_t" as a multiplier, rather than as an exponent, and to correct the residential saturation value given in the figure, changing it from 0.0167 to the correct value of 0.04514. This too has already been corrected in guidance.

Proposed changes to Figure: 30 TAC §350.75(b)(1) also include revising the "Surface Water Exposure Pathway PCL Equation" section of the table to clarify that the PCL for surface water (^{SW}SW) is determined by comparing the value for the risk-based exposure limit for surface water for aquatic life and human health concerns ($^{SW}RBEL$), to the value for the PCL for surface water for ecological protection ($^{SW}SW_{Eco}$), and choosing the smaller of the two values. A change is proposed to the same section of the table to add a cross-reference to §350.77(a).

Proposed §350.75(i)(4) would clarify that PCLs for discharges from groundwater to surface water are equal to PCLs for surface water plus adjustments for dilution (when allowed). The previously mentioned proposed change also clarifies that adjustments for dilution apply to ecological exposure pathways, as well as human health exposure pathways, for discharges from groundwater to surface water. Additional proposed changes to §350.75(i)(4) would clarify that the PCLs for surface water for ecological protection ($^{SW}SW_{Eco}$) must be considered when developing PCLs for discharges from groundwater to surface water, provide a cross-reference to the appropriate section of the rule for developing those PCLs, add a cross-reference to §350.75(i)(4)(A) for clarity, and remove unnecessary cross-references.

The cross-references proposed for deletion are unnecessary because they are contained in §350.75(i)(4)(B). A reference to determining whether a water body is fresh water or marine is proposed for deletion because it applies to the establishment of PCLs for surface water, rather than the development of PCLs for the discharge of groundwater to surface water.

Changes are proposed to §350.75(i)(4)(A) - (C) as a part of the previously mentioned clarification that adjustments for dilution apply to ecological exposure pathways (including aquatic life), as well as to human health exposure pathways.

Proposed §350.76(c), Approaches for Specific Chemicals of Concern to Determine Human Health Protective Concentration Levels, would provide flexibility to establish residential lead $^{Tot}Soil_{Comb}$ PCLs. The revision to the rule allows for the use of property specific inputs and models. Proposed subsection (c)(2) would establish that any model is considered a Tier 3 evaluation. Input values and models used in Tier 3 evaluations require the approval of the agency. Subsequent paragraphs and figures are renumbered to accommodate proposed subsection (c)(2).

Proposed §350.76(e) would direct the use of the same approach currently being used to demonstrate attainment of the critical PCL for 2,3,7,8-TCDD in soil, for attainment of the critical PCL for 2,3,7,8-TCDD in other media (e.g., groundwater, sediment).

Changes are proposed to Figure: 30 TAC §350.76(g)(2), relating to Total Petroleum Hydrocarbons, to revise the surrogate chemicals. The current rule addresses total petroleum hydrocarbon (TPH) contamination using a surrogate-chemical toxicity/physical property approach for the various aliphatic and aromatic carbon range fractions resulting from analysis by TCEQ Method 1006. The surrogate chemicals used by TCEQ for the various aliphatic and aromatic fractions appear in Figure: 30 TAC §350.76(g)(2). The Massachusetts Department of Environmental Protection (MA DEP) was one of the first regulatory agencies to use the toxicity surrogate-chemical approach for addressing environmental TPH contamination (MA DEP, 1994). In 1997, the Total Petroleum Hydrocarbon Criteria Working Group (TPHCWG) published *Development of Fraction Specific Reference Doses (RfDs) and Reference Concentrations (RfCs) for Total Petroleum Hydrocarbons* (TPHCWG, 1997). TCEQ review of the 1994 MA DEP and 1997 TPHCWG approaches was useful in developing the current TRRP toxicity surrogate approach for TPH, and TPHCWG surrogate chemicals and toxicity factors are currently used by TCEQ for several aliphatic and aromatic fractions. In November 2003, MA DEP published their *Final Updated Petroleum Hydrocarbon Fraction Toxicity Values for the VPH/EPH/APH Methodology*. TCEQ reviewed the 2003 MA DEP document and determined that several revisions to the surrogate chemicals found in Figure: 30 TAC §350.76(g)(2) are justified based on new scientific information and/or analyses conducted since the TPHCWG surrogate toxicity factors were published in 1997. Additionally, the footnote to this figure is revised to correct the term to reflect "less than or equal to."

Section 350.77, Ecological Risk Assessment and Development of Ecological Protective Concentration Levels, is proposed to be amended. An ecological risk assessment is conducted to determine the potential impacts posed to ecological receptors (i.e., aquatic life and wildlife) by COCs. The process is a tiered approach, with increasingly complex criteria being evaluated as the process progresses from Tier 1 (using an exclusion criteria checklist to determine if significant exposure to COCs is likely), to Tier 2 (comparing concentrations of COCs at an affected property to literature-based PCLs), to Tier 3 (using site-specific measurements of exposure and the effects of exposure to COCs).

Proposed §350.77(a) would acknowledge existing agency guidance that was planned, but not in existence at the time the current rule was written. The specific guidance document is the agency's *Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas* (RG-263), as amended. The procedures contained in the guidance document have been in use since 2001. Referencing the document in the rule will serve to make the person aware of the existence of the guidance document earlier in the ecological risk assessment process.

Proposed §350.77(a) would also provide the ability to end an ecological risk assessment evaluation even if the Tier 1 evaluation failed, provided the person can demonstrate that a response action (e.g., a cap that prevents exposure to impacted soils) will eliminate the potential for wildlife to be exposed to COCs, or if it can be demonstrated that concentrations of COCs that are protective for humans are also protective of ecological receptors. The rule currently indicates that a person may end the ecological risk assessment evaluation, based on the previously described factors, only if the response action is completed to address exposure to COCs by humans. The proposed changes will broaden the type of response actions that may be considered as justification for ending the ecological risk evaluation to include response actions completed for any reason, so long as the potential for ecological receptors to be exposed to a COC is eliminated or rendered insignificant. The agency has determined that the proposed changes will reduce costs and effort with regard to ecological risk evaluations, without significantly impacting the protection of human health and the environment.

In addition, proposed §350.77(a) would acknowledge the possibility of ending an ecological risk assessment evaluation following a Tier 1 evaluation that is failed due to surface water and/or sediment exposure pathway issues, using the expedited stream evaluation process. The expedited stream evaluation process has been implemented via the previously mentioned *Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas* (RG-263), as amended. The expedited stream evaluation process allows a person to exit the ecological risk assessment process if the evaluation establishes that the completed surface water and sediment exposure pathways are insignificant. Acknowledging the existence of the expedited stream evaluation process in the rule will serve to make the person aware of the existence of the guidance document earlier in the ecological risk assessment process.

Proposed §350.77(b) would include a revision to correct a typographical error and a clarification that a person is required to continue to Tier 2 or Tier 3 of the ecological risk assessment process unless a reasoned justification (described in §350.77(a) of the current rule) and/or an expedited stream evaluation demonstrates that the ecological risk involved is acceptable. The proposed changes would also inform the person that the reasoned justification approach and the expedited stream evaluation process are described in agency's guidance. That guidance document is the *Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas* (RG-263), as amended.

Proposed §350.77(c) is amended to provide a reference to the agency's ecological risk assessment guidance. The proposed revision informs the person of the location of guidance concerning the elimination of a COC that does not pose an ecological risk and the development of PCLs for a COC that does pose an unacceptable risk to selected ecological receptors.

Proposed §350.77(c) would also clarify the current procedure for conducting a Tier 2 screening-level ecological risk assessment. The proposed clarifications are intended to enable the person to avoid a recurring issue that has been observed by agency staff reviewing Tier 2 screening-level ecological risk assessments. The proposed changes do not modify the current procedures for conducting Tier 2 screening-level ecological risk assessments.

Proposed new §350.90, Spatial and Electronic Information, would require a person to provide accurate spatial coordinates for any site data (e.g., sampling locations), as required by the agency, in a format to be specified by the agency. The provision is proposed to facilitate agency management of the data and evaluation and use of the data. Also proposed are conforming rule changes that would delete §§350.91(c), 350.92(b), 350.93(b), 350.94(m), 350.95(f), and 350.96(b). Further conforming rule changes are proposed to §§350.92, 350.93, and 350.96, striking the "(a)" to make subsection (a) in each case implied.

Proposed §350.91(b)(7), Affected Property Assessment Report, would add language to indicate that if an expedited stream evaluation is conducted, it should be included in the APAR.

Additional language is proposed to be added as §350.91(b)(15) to further clarify that the person is to provide spatial data coordinates, as requested by the agency, for the affected property and any sampling or testing locations, in a format that is approved or required by the agency. Existing §350.91(b)(15) is proposed to be renumbered as §350.91(b)(16).

Proposed §350.95(b), Response Action Completion Report, would add institutional control rule citations to help indicate that institutional controls may be established for reasons other than commercial/industrial land use. The proposed language also includes the term "when applicable."

Proposed §350.96(a), Post-Response Action Care Reports, would replace the word "reports" with "report."

Proposed §350.111(c), Use of Institutional Controls, would reflect a clarification and resulting change in language that acknowledges that the subject at issue is more appropriately addressed in this section rather than in the definition of "Person" contained in existing §350.4(a)(62). Therefore, the definition of "Person" is changed in the proposed rule, and that language and concept is incorporated into this section. This clarification is consistent with current practice under the existing rule and reflects the intent that a governmental entity that is not a responsible party is excluded from the requirement of having to obtain written consent from the landowner prior to filing a deed notice or Voluntary Cleanup Program certificate of completion in the real property records. The language is also amended so that if subsection (b)(4) relating to change in circumstance, subsection (d) relating to technical impracticability, or subsection (f) relating to missing landowner, of this section apply, persons also aren't required to obtain written landowner consent.

Proposed §350.111(c)(4) would also incorporate the language and concept that was removed from the definition of "Person" in proposed §350.4(a)(62). This change is consistent with current practice under the existing rule and will provide a governmental entity who is performing remediation activities under this title, but who is not a responsible party, the ability to impose a deed notice on property if the landowner refuses consent to file a restrictive covenant on the property in accordance with Remedy Standard B requirements. This rule provision is needed to extend the beneficial use of finite state and federal remediation funds so that more sites can be addressed, rather than expending excessive funds to complete an unwarranted removal/decontamination remedy, when a control-based remedy that is fully protective of human health and the environment is the lowest cost remedial alternative. Conforming rule changes are proposed to §350.111(c)(2) and (3) to move the "or" at the end of paragraph (2) to the end of paragraph (3).

Proposed §350.111(e) would replace the incorrect cross-reference of §350.33(f)(3)(E) to §350.111(f)(3)(F).

Proposed §350.134(b), Qualifying Criteria (for establishing a facility operations area), would reference 30 TAC Chapter 60, Compliance History, which was adopted post-Chapter 350. Chapter 60 rules establish additional criteria for evaluating the compliance history of a facility.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency. However, for other units of state government, local governments, or federal entities that are responsible for clean up of contaminated sites under the Voluntary Cleanup, Corrective Action, Petroleum Storage Tank (PST), and Superfund Programs, there may be some fiscal implications as a result of administration or enforcement of the proposed rules. These fiscal implications are not anticipated to be significant.

The proposed rules amend various portions of Chapter 350 to correct misspellings, typographical errors, mathematical errors, and other minor errors found in the current rule; to clarify and modify rule provisions to facilitate consistent and effective rule interpretation; to incorporate current guidance practices into rule language; to support the use of a new electronic data management system; and to expand the use of geographical information system technology to improve the use and availability of technical information used by the agency. The proposed rules would apply to regulated entities responsible for cleanup of contaminated sites under the Voluntary Cleanup, Corrective Action, PST, Dry Cleaners, and Superfund Programs throughout the state.

In general, cost increases are not anticipated under the proposed rules since they incorporate current guidance in many cases. However, the proposed rules would require the collection and reporting of spatial data coordinates. Any cost increases associated with this provision are expected to be minimal. Costs for spatial data coordinates are estimated to be less than $100 per data location. Cost savings, which are not anticipated to be significant, may occur under the proposed rules that pertain to certain legacy LPST sites, to certain situations where groundwater samples do not have to be collected, and to certain circumstances where a full-scale ecological risk assessment is not required. In situations where groundwater samples do not have to be collected, cost savings can range from $100 - $200 per sample. If ten monitoring wells would be required under the current rules, the proposed rules could save regulated entities as much as $2,000 per site. Where detailed, complex ecological risk evaluations will not be required, cost savings could be as much as $1,000 - $10,000 per assessment. Staff estimates that there may be 300 - 400 governmental entities that could experience these cost increases and cost savings under the proposed rules.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be fair, efficient, and continued protection of public health and safety through environmental cleanup of contaminated sites.

In general, cost increases are not anticipated for individuals and large businesses under the proposed rules since they incorporate current guidance in many cases. However, the proposed rules will require the collection and reporting of spatial data coordinates. Any cost increases associated with this provision are expected to be minimal. Costs for spatial data coordinates are estimated to be less than $100 per data location. Cost savings, which are not anticipated to be significant, may occur under the proposed rules that pertain to certain legacy LPST sites, to certain situations where groundwater samples do not have to be collected, and to certain circumstances where a full-scale ecological risk assessment is not required. In situations where groundwater samples do not have to be collected, cost savings can range from $100 - $200 per sample. If ten monitoring wells would be required under the current rules, the proposed rules could save regulated entities as much as $2,000 per site. Where detailed, complex ecological risk evaluations will not be required, cost savings could be as much as $1,000 - $10,000 per assessment. Staff estimates that there may be 900 - 1,200 large businesses that could experience these cost increases and savings.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No significant adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small or micro-businesses responsible for clean up of contaminated sites may experience the same cost increases for data point collection and the same cost savings from reduced collection of water samples and ecological risk evaluations as those incurred by governmental entities and large businesses under the proposed rules. Staff estimates that there may be 1,800- 2,400 small or micro-businesses that could experience these types of fiscal implications.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission has determined that the proposed rulemaking does not fall under the definition of a "major environmental rule" because the proposed amendments and new rule are primarily designed to clarify the existing regulatory requirements and adjust methods and measures to ensure a consistent application of soil and water analysis and remediation standards. In furtherance of this effort at promoting consistency, certain policies and practices concerning sampling, remediating, and reporting are altered in a manner which ensures flexibility in the remediation process while maintaining appropriate protection of human health and the environment. The proposed amendments and new rule do not rise to the level of material, but rather are limited to incorporating modifications to the current regulatory framework based upon the implementation of the rules to date.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency,

but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to clarify the existing regulatory requirements and adjust methods and measures to ensure a consistent application of soil and water analysis and remediation standards. Among other technical changes, the proposed rule contains a clarification of language regarding the filing of institutional controls by non-responsible party governmental entities performing remedial actions. The proposed change reflects the practice of the existing rule but inserts the clarifying language in §350.111 as opposed to the prior means of excluding the qualifying governmental entities from the defined subset of persons to whom TRRP is applicable in §350.4(a)(62). Inserting the language in §350.111, rather than §350.4(a)(62), is proposed to achieve the same result of the existing rule regarding institutional controls while avoiding the overbroad and unintended interpretation that governmental entities are excluded from all other requirements of TRRP.

Promulgation and enforcement of the proposed amendments and new rule would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the proposed clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because the proposed amendments and new rule do not materially change the substance of the rule but rather clarify the institutional control process as it relates to non-responsible party governmental entities conducting remedial actions. Therefore, the proposed rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. Comments must be received by October 9, 2006. All comments should reference Rule Project Number 2005-033-350-PR. The proposed rules may be viewed on the commission's web site at *http://www.tceq.state.tx.us/nav/rules/prose_adopt.html*. For further information or questions concerning this proposal, please contact Maria Lebron, Remediation Division, (512) 239-1898.

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §§350.2 - 350.4

STATUTORY AUTHORITY

The amended rules are proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and Texas Health and Safety Code (THSC), Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rules are proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rules is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendments implement TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.2. Applicability.

(a) - (b) (No change.)

(c) Property regulated under Chapter 330 of this title (relating to Municipal Solid Waste). Persons shall comply with the requirements of this chapter for those municipal solid waste properties except when subject to the requirements of 40 Code of Federal Regulations Parts 257 and/or 258, as amended. However, for those municipal solid waste properties subject to the requirements of 40 Code of Federal Regulations Parts 257 and/or 258, as amended, the executive director may establish an alternative health-based groundwater protection standard for a COC in accordance with §330.409 [~~§330.235(i)~~] of this title (relating to Assessment Monitoring Program), as amended. Determination of such an alternative standard shall be made using the procedures of Subchapter D of this chapter (relating to Development of Protective Concentration Levels).

(d) - (e) (No change.)

(f) Property regulated under Chapter 333 of this title (relating to Brownfields [~~Brownfield~~] Initiatives). The person entering the Voluntary Cleanup Program (VCP) shall comply with all requirements found in the Texas Health and Safety Code, Chapter 361, Subchapter S, as amended, concerning the Voluntary Cleanup Program; Subchapter A of Chapter 333 of this title (relating to Voluntary Cleanup Program Section), as amended; and the requirements of this chapter. Where there is a conflict between the requirements of this chapter and the requirements in the Texas Health and Safety Code, Chapter 361, Subchapter S, as amended, and Chapter 333, Subchapter A of this title, as amended, the requirements of the Texas Health and Safety Code, Chapter 361, Subchapter S, as amended, and Chapter 333, Subchapter A of this title, as amended, shall apply.

(g) Property regulated under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks). The person shall comply with the requirements of this chapter for the assessment, response actions, and post-response action care for releases of regulated substances from underground storage tanks (USTs) as specified in Chapter 334, Subchapter A of this title (relating to General Provisions), as amended, and for releases of petroleum products from aboveground storage tanks (ASTs) as specified in Chapter 334, Subchapter F of this title (relating to Aboveground Storage Tanks), as amended, which are reported to the executive director in accordance with Chapter 334, Subchapter D of this title (relating to Release Reporting and Corrective Action), as amended, on or after September 1, 2003, unless a variance is granted in accordance with requirements described in paragraphs (1) - (8) of this subsection. Additional corrective action requirements for these facilities are found in Chapter 334, Subchapters D, J, and K of this title (relating to Release Reporting and Corrective Action; Leaking Petroleum Storage Tank Corrective Action Specialist Registration and Project Manager Licensing [~~Registration of Corrective Action Specialists and Project Managers for Product Storage Tank Remediation Projects~~]; and Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil, respectively), as amended. For releases discovered and reported to the executive director before September 1, 2003, the person shall continue to comply with Chapter 334 Subchapters D, G, H, J, K, and M of this title (relating to Release Reporting and Corrective Action; Target Concentration Criteria; [~~Interim~~] Reimbursement Program; Leaking Petroleum Storage Tank Corrective Action Specialist Registration and Project Manager Licensing [~~Registration of Corrective Action Specialists and Project Managers for Product Storage Tank Remediation Projects~~]; Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil; and Reimbursable Cost Specifications [~~Guidelines~~] for the Petroleum Storage Tank Reimbursement Program, respectively), as amended, which were in effect prior to the effective date of this chapter, not to preclude compliance with a subsequent amendment of 30 TAC 334 of this title (Underground and Aboveground Storage Tanks).

(1) The executive director receives a written request from the person in a prescribed or allowed format for a variance from applicability of this chapter, as amended, that includes:

(A) documentation in accordance with the requirements of Chapter 334, Subchapters A, C, D, and F of this title, as amended and as applicable, or as indicated by other credible and appropriate evidence acceptable to the executive director that before September 1, 2003, the UST system at the property for which the variance is sought was permanently removed from service and the AST at the property for which the variance is sought was removed from the property;

(B) a draft restrictive covenant that will be filed in the property records of the county where the property is located upon granting of the variance by the executive director that:

(i) prohibits use of ASTs or USTs at the property or at any subsequent subdivision of the property;

(ii) is written in favor of the TCEQ and the State of Texas;

(iii) runs with the land;

(C) identification of UST or AST release sites addressed under Chapter 334, Subchapters D and G of this title, as amended, that are in proximity to the property for which the variance is sought, with a justification as to why compliance with this chapter would result in a degree of regulatory inequity that is not justifiable after comparing the release, site, and receptor conditions and other relevant factors for those other release sites with the release for which the variance is sought.

(2) The executive director may request additional information reasonably necessary for appropriate consideration of the variance request. Should the executive director make such a request, the person shall provide any additionally requested information within 45 calendar days of the date the executive director makes the request, or within another time period directed or agreed upon by the executive director.

(3) The executive director agrees there would be an unjustifiable degree of regulatory inequity and specifically grants the requested variance after consideration of information provided in accordance with paragraphs (1) and (2) of this subsection and accordingly provides written notice to the person that the variance is granted. The executive director may direct changes to be made to the draft restrictive covenant as necessary to ensure the restrictive covenant performs with the intent of this subsection.

(4) After receiving the written notice described in paragraph (3) of this subsection, the person shall provide:

(A) proof in a form acceptable to the executive director within 45 calendar days of the date the written notice granting the variance was issued by the executive director that the restrictive covenant described in paragraph (1)(B) of this subsection was filed in the property records of the county where the property is located;

(B) a copy of the restrictive covenant filed in the property records.

(5) Failure to comply with paragraph (4) of this subsection will result in subsequent repeal of the variance by the executive director, unless the person can provide compelling evidence that it was reasonably outside their ability to comply (e.g., affected by natural disaster or tragedy).

(6) The executive director will notify the person seeking the variance in writing if the variance is denied or repealed and give the reason(s) if the variance is denied or repealed.

(7) Once the variance is in effect, then the person shall comply with Chapter 334, Subchapters D and G of this title, as amended, in lieu of this chapter.

(8) If the property or subdivision of the property is subsequently used for UST or AST purposes regulated under Chapter 334 of this title, as amended, then the variance is automatically repealed and this chapter will then become applicable to the release, regardless of whether the release has been fully addressed and closed under Chapter 334, Subchapters D and G of this title.

(h) Property regulated under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste). The person shall comply with the requirements of this chapter when undertaking the remediation of affected property at facilities used for the storage, processing or disposal of industrial solid waste or municipal hazardous waste, or for the remediation of environmental media containing COCs resulting from releases from waste management facility components (e.g., tank, container storage area, surface impoundment, etc.), either as part of closure or at any time before or after closure. The person shall close a waste management facility component in a manner that minimizes or eliminates the need for further maintenance and controls. The manner of closure shall also minimize or eliminate, to the extent necessary to protect human health and the environment, the post-closure escape of waste, contaminants, leachate, run-off, or decomposition products to the surrounding environmental media. Waste management facility components undergoing closure for which the person can demonstrate that no release of COCs to surrounding environmental media has occurred are subject to this chapter only with regard to this closure performance standard and the removal, decontamination or control requirements for waste as specified in Subchapter B of this chapter (relating to Remedy Standards). In the event a release of COCs to surrounding environmental media has occurred, then the person shall comply with this chapter for response to the release. The person shall comply with §335.118(b) of this title (relating to Closure Plan; Submission and Approval of Plan), as amended, or applicable permit provisions regarding requirements for public participation in the corrective action process for permitted hazardous waste facilities. The person shall also comply with the requirements of paragraphs (1) - (3) of this subsection, as applicable.

(1) (No change.)

(2) Any person who stores, processes, or disposes of hazardous waste is also subject to the applicable provisions relating to closure and post-closure in Chapter 335, Subchapters E and F of this title (relating to Interim Standards for Owners and Operators [~~owners and operators~~] of Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, respectively), as amended.

(3) - (4) (No change.)

(i) Affected property regulated under Chapter 335, Subchapter K of this title (relating to Hazardous Substance Facilities Assessment and Remediation). The person shall comply with all requirements found in the Texas Health and Safety Code, Chapter 361, Subchapter F, as amended; Chapter 335, Subchapter K of this title [~~(relating to Hazardous Substance Facilities Assessment and Remediation)~~], as amended; and the requirements of this chapter for any release or threatened release of hazardous substances into the environment that may constitute an imminent and substantial endangerment to public health and safety or the environment. Where there is a conflict between the requirements in this chapter and the requirements of Texas Health and Safety Code, Chapter 361, Subchapter F, as amended, and Chapter 335, Subchapter K of this title, as amended, the requirements of Texas Health and Safety Code, Chapter 361, Subchapter F and Chapter 335, Subchapter K of this title shall apply.

(j) (No change.)

(k) Property regulated under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation). The executive director may reference this chapter in permits subject to Chapter 312 of this title, as amended, when specifying closure provisions to address releases of COCs from facility components at municipal wastewater treatment plants.

(l) (No change.)

(m) Use of this chapter on or after May 1, 2000. The person who started a response action under Chapter 335, Subchapters A and S of this title (relating to Industrial Solid Waste [~~Wastes~~] and Municipal Hazardous Waste [~~Wastes~~] in General; Risk Reduction Standards, respectively), as amended, may qualify to continue under those previous commission rules subject to the limitations specified in paragraphs (1) - (4) of this subsection. Any person desiring to remain under Chapter 335 of this title may not use any of the provisions of this chapter. If a person elects to proceed under this chapter, then they shall not be allowed to return to Chapter 335 of this title. Also, the person shall respond as described in §350.35 of this title (relating to Substantial Change in Circumstances) in the event a substantial change in circumstance occurs which results in an unacceptable threat to human health or the environment.

(1) The person who has submitted an initial notification of intent to conduct a Risk Reduction Standard 1 or 2 response action (i.e., §335.8(c)(1) and (2) of this title (relating to Closure [~~Closures~~] and Remediation), as amended) prior to May 1, 2000, and has submitted a final report within five years after that date may request that the response action be reviewed according to the regulations in effect at the time of initial notification. Persons will automatically qualify for this grandfathering provision if they have previously received a letter from the agency acknowledging receipt of the initial notification, or submit other forms of documentation by May 1, 2001, that proper and timely notification had been made. [~~Any person desiring to remain under Chapter 335 of this title may not use any of the provisions of this chapter.~~]

(2) The person who has submitted a remedial investigation report that fully complies with §335.553(b)(1) of this title (relating to Required Information [~~Risk Reduction Standard No. 3~~]), as amended, prior to May 1, 2001, may elect to either continue under those rules or to proceed under this chapter. [~~Any person desiring to remain under Chapter 335 of this title may not use any of the provisions of this chapter. If a person elects to proceed under this chapter, then they shall not be allowed to return to Chapter 335 of this title.~~]

(3) - (4) (No change.)

§350.3. Process.

Once a release of COCs as defined by various programs has been identified and reported pursuant to rules or procedures established by one of the program areas identified in §350.2 of this title (relating to Applicability), this chapter controls the assessment and any action taken in response to that release. Upon initial notification to the appropriate program, the person will follow the general process as stated in paragraphs (1) - (5) of this section to demonstrate compliance with this chapter.

(1) - (3) (No change.)

(4) The person shall develop and submit the reports required in Subchapter B of this chapter (relating to Remedy Standards) which contain the information specified for each report in Subchapter

E of this chapter (relating to Reports). The sequencing of report submission is illustrated in the following figure.
Figure: 30 TAC §350.3(4)
[~~Figure: 30 TAC §350.3(4)~~]

(5) (No change.)

§350.4. Definitions and Acronyms.

(a) Definitions.

(1) - (5) (No change.)

(6) Background--A population of concentrations characterized from samples in an environmental medium containing a chemical of concern that is naturally occurring (i.e., the concentration is not due to a release of chemicals of concern from human activities) or anthropogenic (i.e., the presence of a chemical of concern in the environment which is due to human activities, but is not the result of site-specific use or release of waste or products, or industrial activity). Examples of anthropogenic sources might include non-site specific sources such as lead from automobile emissions, arsenic from use of defoliants, [~~and~~] polynuclear aromatic hydrocarbons resulting from combustion of hydrocarbons, and diffuse non-point source pollution in surface water and sediment. There are some commonalities regardless of the activity; specifically, the chemicals of concern have resulted from the use of a product in its intended manner and may be present at generally low levels over large areas (tens of square miles up to hundreds of square miles). Background is required for use in a statistical model appropriate for testing the hypothesis that the background area characterized by these kinds of models has the same concentrations of the chemical of concern as the affected property. The background area characterized is as "close" as possible to the affected property, in either space or time, as required.

(7) Bedrock--The solid rock (i.e., consolidated, coherent, and relatively hard naturally formed material that [~~than~~] cannot normally be excavated by manual methods alone) that underlies gravel, soil or other surficial material.

(8) - (10) (No change.)

(11) Chemical of concern--Any chemical that has the potential to adversely affect ecological or human receptors due to its concentration, distribution, and mode of toxicity. Depending on the program area, chemicals of concern may include the following: solid waste, industrial solid waste, municipal solid waste, and hazardous waste as defined in the Texas Health and Safety Code, §361.003, as amended; hazardous constituents as listed in 40 Code of Federal Regulations Part 261, Appendix VIII, as amended; constituents on the groundwater monitoring list in 40 Code of Federal Regulations Part 264, Appendix IX, as amended; constituents as listed in 40 Code of Federal Regulations Part 258 Appendices I and II, as amended; pollutant as defined in Texas Water Code, §26.001, as amended; hazardous substance as defined in the Texas Health and Safety Code, §361.003, as amended, and [~~the~~] Texas Water Code, §26.263, as amended; regulated substance as defined in Texas Water Code, §26.342, as amended, and §334.2 of this title (relating to Definitions), as amended; petroleum product as defined in Texas Water Code, §26.342, as amended, and §334.122(b)(12) of this title (relating to Definitions for ASTs), as amended; other substances as defined in Texas Water Code, §26.039(a), as amended; and daughter products of the aforementioned constituents.

(12) (No change.)

(13) Commercial/industrial land use--Any real property or portions of a property not used for human habitation or for other purposes with a similar potential for human exposure as defined for residential land. Examples of commercial/industrial land use include manufacturing; industrial research and development; utilities; commercial warehouse operations; lumber yards; retail gas stations; auto service stations; auto dealerships; equipment repair and service stations; professional offices (lawyers, architects, engineers, real estate, insurance, etc.); medical/dental offices and clinics (not including hospitals); financial institutions; office buildings; any retail business whose principal activity is the sale of food or merchandise; personal service establishments (health clubs, barber/beauty salons, mortuaries, photographic studios, etc.); churches (not including churches providing day care or school services other than during normal worship services); motels/hotels (not including those which allow residence); agricultural lands; and portions of government-owned land (local, state, or federal) that have commercial/industrial activities occurring. Land use activities consistent with this classification have the North American Industrial Classification System code numbers 11 - 21 inclusive; 22 except 22131; 23 - 56 inclusive; 61 except 61111, 61121, and 61131; 62 except 62211, 62221, 62231, 62311, 62322, 623311, 623312, 62399, and 62441; 71 except 71219; 72 except 721211 and 72131; 81 except 814 [~~inclusive~~]; and 92 excluding 92214.

(14) - (44) (No change.)

(45) Implementation Procedures--The most current version of *Procedures to Implement the Texas Surface Water Quality Standards* [~~*Implementation of the Texas Natural Resource Conservation Commission Standards via Permitting*~~], as amended.

(46) Innocent Owner or Operator--Those persons so designated in accordance with [~~the~~] Texas Health and Safety Code, Chapter 361, Subchapter V, Immunity From Liability of Innocent Owner or Operator, as amended.

(47) - (57) (No change.)

(58) Natural Resource Trustees--The federal agencies as designated by the President and the state agencies as designated by the Governor pursuant to the National Contingency Plan, Oil Pollution Act, and CERCLA §107(f)(2)(A) and (B) to act on behalf of the public as trustees of natural resources (e.g., water, air, land, wildlife). The Trustees include TCEQ [~~TNRCC~~], Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the Department of the Interior.

(59) - (61) (No change.)

(62) Person--An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity[~~, but excluding a governmental entity that is not a responsible party performing a remedial action~~].

(63) - (77) (No change.)

(78) Sample detection [~~quantitation~~] limit--The method detection limit, as defined in this section, adjusted to reflect sample-specific actions, such as dilution or use of smaller aliquot sizes than prescribed in the analytical method, and to take [~~takes~~] into account sample characteristics, sample preparation, and analytical adjustments. The term, as used in this rule, is analogous to the sample-specific detection limit.

(79) - (87) (No change.)

(88) Surface soil--For human health exposure pathways, the soil zone extending from ground surface to 5 [~~15~~] feet in depth [~~for residential land use and from ground surface to 5 feet in depth for commercial/industrial land use~~]; or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth. For ecological exposure pathways, the soil zone extending from ground surface to 0.5 feet in depth.

(89) - (91) (No change.)

(b) Acronyms.

(1) - (19) (No change.)

(20) TCEQ--Texas Commission on Environmental Quality [~~TNRCC--Texas Natural Resource Conservation Commission; and~~];

(21) TPDES--Texas Pollutant Discharge Elimination System; and

(22) [~~(21)~~] U.S. EPA--United States Environmental Protection Agency.

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-6087

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SUBCHAPTER B. REMEDY STANDARDS

30 TAC §§350.33, 350.34, 350.37

STATUTORY AUTHORITY

The amended rules are proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rules are proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rules is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendments implement TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.33. Remedy Standard B.

(a) - (e) (No change.)

(f) The following are the Remedy Standard B groundwater response objectives and associated requirements for response actions performed in accordance with subsections (a)(1) - (2), and (a)(3)(A) of this section to address human health or environmental risk at an affected property. The person shall achieve the Remedy Standard B groundwater PCLE zone response objectives stated in paragraph (1) of this subsection, unless the person demonstrates that an affected property meets the qualifying criteria for one, or a combination, of the modified groundwater response approaches described in paragraphs (2) - (4) of this subsection. A person who satisfactorily demonstrates technical impracticability as described in paragraph (3) of this subsection, may use technical impracticability to establish a plume management zone as described in paragraph (4) of this subsection for instances when a plume management zone would not otherwise be authorized by the executive director, except that the person shall not allow the groundwater plume management zone to expand beyond the existing boundary of the groundwater PCLE zone. A person who uses one, or a combination, of the modified groundwater response approaches shall fulfill the post-response action care obligations described in the approved RAP. A person who uses one, or a combination, of the modified groundwater response approaches which utilizes a physical control(s) shall provide financial assurance as specified in subsections (l) and (m) of this section.

(1) - (2) (No change.)

(3) Technical impracticability. A technical impracticability demonstration can be used for all three classes of groundwater under Remedy Standard B. To use this approach, the person must:

(A) - (C) (No change.)

(D) achieve the performance criteria in subsection (f)(4)(E)[~~,~~] of this section for NAPLs;

(E) - (F) (No change.)

(4) Plume management zones. With the approval of the executive director, the person may use a plume management zone under Remedy Standard B for class 2 and 3 groundwater-bearing units which presently contain a groundwater PCLE zone.

(A) - (B) (No change.)

(C) In order to establish a plume management zone, the person must:

(i) comply with the institutional control requirements in §350.31(g) of this title [(~~relating to General Requirements for Remedy Standards~~)], with the exception that proof of compliance with the institutional control requirements shall be submitted to the executive director within 120 days of the approval of the RAP, which provides notice of the existence and location of the plume management zone and which prevents exposure to groundwater from this zone until such time as COCs may reduce to the critical groundwater PCLs;

(ii) - (iii) (No change.)

(D) (No change.)

(E) The person is required to reduce NAPLs which contain COCs in excess of PCLs within a plume management zone to the extent that all of the following are met [~~practicable. In the determination of adequate NAPL reduction, the executive director may consider conformance with the following criteria and other relevant factors~~]:

(i) the presence of any remaining NAPLs will not result in an unacceptable risk to human health or the environment [~~readily recoverable NAPLs have been recovered~~];

(ii) - (v) (No change.)

(F) (No change.)

(g) - (k) (No change.)

(l) For properties using physical control measures in response to subsections (e)(2) and/or (f) of this section, financial assurance shall be established and maintained for the post-response action care period specified in subsection (h) of this section. The person shall prepare and include in the RAP a written cost estimate in current dollars of the total cost of the post-response action care activities for the post-response action care period specified in subsection (h) of this section. The cost estimate shall be based on the costs of hiring a third party to conduct the post-response action care activities. Within 90 days after the executive director's approval of the RAP and before commencing work indicated in the RAP, an acceptable financial assurance mechanism must be submitted to the commission for post-response action care in the amount specified in the approved RAP. If the total post-response action care cost estimate is $100,000 or less, the executive director may choose to exempt the person from providing a financial assurance demonstration. For persons meeting the requirements of subsection (n) of this section [~~subchapter~~], the amount of financial assurance demonstrated may be less than the total post-response action care cost estimate. Financial assurance for post-response action care shall be demonstrated in compliance with Chapter 37, Subchapter N of this title (relating to Financial Assurance Requirements for the Texas Risk Reduction Program Rules [~~Rule~~]). The executive director may perform the post-response action care activities at an affected property using the funds provided for this purpose when the executive director determines that a person has failed to provide the post-response action care described in an approved RAP.

(m) For properties using physical control measures in response to subsections (e)(2) and/or (f) of this section that require post-response action care beyond the initial post-response action care period, financial assurance shall continue to be demonstrated for the post-response action care period specified in subsection (j) of this section. At least 180 days before the end of the preceding post-response action care period, a written cost estimate in current dollars shall be prepared and submitted for the cost of continuing the post-response action care activities specified in the approved RAP for the additional post-response action care period specified in subsection (j) of this section. The cost estimate shall be based on the costs of hiring a third party to conduct the post-response action care activities. At least 90 days before the end of the preceding post-response action care period, an acceptable financial assurance mechanism shall be submitted for the continued post-response action care period in an amount approved by the executive director. If the total post-response action care cost estimate is $100,000 or less, the executive director may choose to exempt the person from providing a financial assurance demonstration. For persons meeting the requirements of subsection (n) of this section, the amount of financial assurance demonstrated may be less than the total post-response action care estimate. Financial assurance for post-response action care shall be demonstrated in compliance with Chapter 37, Subchapter N of this title (relating to Financial Assurance Requirements for the Texas Risk Reduction Program Rule). The executive director may perform the continued post-response action care activities at an affected property using the funds provided for this purpose when the executive director determines that a person has failed to provide the post-response action care described in an approved RAP.

(n) The owner or an authorized officer of a small business, as defined in this subsection, may seek to reduce the amount of financial assurance demonstrated under this subsection if the initial post-response action care period or subsequent post-response action care periods specified in subsections (h) - (j) of this section are greater than ten years. If the executive director determines a person meets the definition as specified in paragraph (2) of this subsection, the person shall submit the affidavit required by paragraph (1) of this subsection and establish and maintain financial assurance for the post-response action care period in an amount based on the following equation: ((total cost estimate)/(number of years in total response action care period)) X 10. The owner shall continue demonstrating subsequent post-response action care in ten year periods or as directed by the executive director. The owner or an authorized officer is required to notify the executive director when the definition specified in paragraph (2) of this subsection is no longer met. A small business must comply with subsections (l) and (m) of this section relating to financial assurance.

(1) - (2) (No change.)

§350.34. No Further Action.

Particular agency program areas covered by this rule will confirm that a person has completed all necessary response actions at an affected property and that no further action is required. The program areas may issue other letters acknowledging conditional or partial completion of response actions, as appropriate.

(1) For Remedy Standard A, such confirmation will be issued subsequent to approval of the RACR by the executive director and, when applicable, receipt by the agency of proof that an institutional control noting commercial/industrial land use is in effect for the affected property in accordance with §350.31(g) of this title (relating to General Requirements for Remedy Standards), §350.51(1), (3) or (4) of this title (relating to Affected Property Assessment), and §350.74(b)(1) or §350.74(j)(2) of this title (relating to Development of Risk-Based Exposure Limits).

(2) For Remedy Standard B, a conditional no further action letter will be issued subsequent to approval of the RACR by the executive director and, when applicable, receipt by the agency of proof that institutional controls are [~~an institutional control is~~] in effect for the affected property in accordance with §350.31(g) of this title (relating to General Requirements for Remedy Standards), §350.51(1), (3), or (4) of this title, and §350.74(b)(1) or (j)(2) of this title. The letter will indicate that the person has conditionally completed response actions at the affected property but must perform post-response action care obligations as described in the approved RAP throughout the initial and any continued post-response action care period in response to §350.33(h) - (j) of this title (relating to Remedy Standard B). The letter will also indicate whether the person must establish and maintain financial assurance in response to §350.33(l) and/or (m) of this title [(~~relating to~~

~~Remedy Standard B)~~] for post-response action care for affected properties which use physical controls.

(3) For Remedy Standard B, a final no further action letter will be issued subsequent to termination of the post-response action care period by the executive director as described in §350.33(i) of this title [~~(relating to Remedy Standard B)~~].

§350.37. Human Health Points of Exposure.

(a) - (h) (No change.)

(i) POEs for surface water runoff or groundwater discharges to surface water. The prescribed POE to surface water will be at the point of surface water runoff or groundwater discharge (i.e., within the groundwater) into and throughout the extent of any on-site or off-site surface water body meeting the definition of surface water in the state as defined in §307.4 of this title (relating to General Criteria), as amended. This includes the surface water body at the initial point of entry and any water bodies that may be impacted by COCs.

(j) (No change.)

(k) POEs for sediment. The prescribed POE to sediment is within the upper one-foot of sediment beneath any surface water body meeting the definition of surface water in the state as defined in §307.4 of this title, as amended. For intermittent water bodies, both sediment and surface soil POEs may apply.

(l) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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SUBCHAPTER C. AFFECTED PROPERTY ASSESSMENT

30 TAC §350.51, §350.54

STATUTORY AUTHORITY

The amended rules are proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rules are proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rules is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendments implement TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.51. Affected Property Assessment.

(a) - (c) (No change.)

(d) For the vertical soil assessment to adequately determine if groundwater has been or will be affected, the person shall complete the requirements of paragraph (1), (2), (3), or (4) [~~or (2)~~] of this subsection.

(1) The person shall demonstrate that the vertical limit of COCs in soil which exceed the higher of the method quantitation limit or background concentrations has been characterized[~~, unless an adequate groundwater assessment has been conducted (e.g., COC concentrations in groundwater have been measured from appropriate locations)~~]. If the person satisfactorily demonstrates that all reasonably available analytical technology has been used to show that the COC cannot be measured to the method quantitation limit due to sample specific interferences, then the sample detection [~~quantitation~~] limit may be used in lieu of the method quantitation limit. [~~If a groundwater assessment has been conducted, then the person shall characterize the vertical limit of COCs in soil which exceeds the ^{GW}Soil PCL, unless the person can meet the requirements of §350.75(i)(7)(C) of this title (relating to Tiered Human Health Protective Concentration Level Evaluation.). If the uppermost groundwater-bearing unit is encountered before the vertical limit of COCs is determined, then representative groundwater samples (i.e., a groundwater sample does not have to be collected from each boring) must be collected to evaluate potential groundwater impacts. The vertical extent of the soil assessment shall continue beyond the uppermost groundwater-bearing unit as appropriate based on the likelihood that COCs have migrated deeper considering the chemical and physical properties of the COCs (e.g., dense non-aqueous phase liquids) and the hydrogeology of the affected property. The executive director may omit or modify this requirement on a site-specific basis~~

~~if the vertical assessment would exacerbate the vertical migration of COCs.~~]

(2) If an adequate groundwater assessment has been conducted (i.e., COC concentrations in groundwater have been measured from appropriate locations), then the person shall characterize the vertical limits of COCs in soil which exceed the assessment level. The ^{GW}Soil PCL may not be applicable as an assessment level if the person has conducted an adequate groundwater assessment and can meet the requirements of §350.75(i)(7)(C) of this title (relating to Tiered Human Health Protective Concentration Level Evaluation). The executive director may omit or modify the requirement for a groundwater assessment under this paragraph for use of §350.75(i)(7)(C) of this title on a site-specific determination based on probable depth to groundwater, presence of soils or bedrock that prohibit or impede vertical migration of COCs, and physical and chemical properties of the COCs.

(3) If the uppermost groundwater-bearing unit is encountered before the vertical limit of COCs is determined to the higher of the method quantitation limit or background concentrations, then representative groundwater samples (i.e., a groundwater sample does not have to be collected at each boring location) must be collected to evaluate potential groundwater impacts. The vertical extent of the soil assessment shall continue beyond the uppermost groundwater-bearing unit as appropriate based on the likelihood that COCs have migrated deeper considering the chemical and physical properties of the COCs (e.g., dense non-aqueous phase liquids) and the hydrogeology of the affected property. The executive director may omit or modify this requirement on a site-specific basis if the vertical assessment would exacerbate the vertical migration of COCs.

(4) [~~(2)~~] If a person has already determined that the groundwater is impacted, then they may satisfy the requirements of this subsection by declaring the entire soil column to the top of the lowest impacted groundwater bearing unit as a soil PCLE zone.

(e) - (h) (No change.)

(i) The person shall conduct a field survey to locate potential receptors, including water wells and surface waters to at least 500 feet beyond the boundary of the affected property; and conduct a records survey to identify properties that are not connected to a public water supply, and all water wells and surface water bodies within 1/2 mile of the limits of groundwater which contains COCs in excess of the residential assessment level. The person shall also attempt to identify any off-site properties within 1/4 mile of the affected property that have environmental information (e.g., soil boring logs, analytical results from samples of environmental media, etc.) collected for submission to the agency which may be useful in fulfilling the requirements of this section, although collection and submittal of this information by the person is not required.

(j) When determining concentrations of COCs in an environmental medium [~~groundwater~~], the person shall collect and handle [~~groundwater~~] samples in accordance with sampling methodologies which will yield representative concentrations of COCs present in the sampled medium [~~groundwater~~].

(k) When determining concentrations of COCs in surface water and sediment, the person shall collect and handle [~~surface water~~] samples in accordance with the requirements in the agency's *Surface Water Quality Monitoring Procedures, Volume I* [~~*Implementation Procedures*~~], as amended, or shall use an alternative methodology approved by the executive director.

(l) (No change.)

(m) If a person does not desire to determine a site-specific soil background concentration, then they may use the Texas-specific median background concentrations for metals provided in the following figure. The Texas-specific background concentrations may be used to determine the critical PCL and then used in comparisons to individual measurements of COCs or representative concentrations of COCs in accordance with §350.79(1) or (2)(A) of this title (relating to Comparison of Chemical of Concern Concentrations to Protective Concentration Levels), respectively.
Figure: 30 TAC §350.51(m)
[~~Figure: 30 TAC §350.51(m)~~]

(n) Analytical results, including non-detected analytical results, should be considered whether doing direct comparisons of individual measurements or when using statistical or geostatistical approaches. In cases where there is reason to believe, based on available analytical data, that the COC could be present at that sampling location and that the concentration of the COC is suspected to be near but below the sample detection [~~quantitation~~] limit, the full value of the sample detection [~~quantitation~~] limit should be used as a proxy for the non-detected result. If there is reason to believe, based on available analytical data, that the COC could be present at that sampling location and that the concentration of the COC is suspected to be below, but not near to, the sample detection [~~quantitation~~] limit, then 1/2 the sample detection [~~quantitation~~] limit should be used as a proxy for the non-detected result. Other statistically-based approaches for handling non-detected results or assigning proxy values may be appropriate and approved if there is sufficient technical basis. If greater than 15 percent non-detected results are reported for a particular medium, and the exposure area cannot be definitively identified based on documented and verifiable site-specific information, the executive director may require persons to utilize alternative statistical methods for calculating the concentration term.

(o) (No change.)

§350.54. Data Acquisition and Reporting Requirements.

(a) - (c) (No change.)

(d) The person shall ensure that the laboratory selected to perform the analyses of samples has in place an adequate and documented quality assurance program and the capability to meet the project and measurement objectives. The laboratory's quality assurance program must be compliant with the requirements in Chapter 25 of this title (relating to Environmental Testing Laboratory Accreditation and Certification), as amended, by July 1, 2008. For data generated on or before July 1, 2008, the person shall ensure the laboratory's quality assurance program is [~~should be generally~~] consistent with:

(1) - (2) (No change.)

(e) The person shall ensure the data are generated by a laboratory performing the analytical methods that meet the intralaboratory performance standards for the method and that those performance standards are sufficient to meet the bias, precision, sensitivity, representativeness, comparability, and completeness, as specified in the project data quality objectives.

(1) - (3) (No change.)

(4) The method detection limit shall be verified after major instrument maintenance[~~, a change in analyst,~~] or major changes in instrumentation or instrument conditions. The person shall ensure that the laboratory has performed and has documented an initial demonstration of proficiency for the analysis of each COC and each method used, and has also demonstrated, in a scientifically valid manner, and has documented the method detection limit the laboratory can achieve. This demonstration and documentation shall be preparatory and method specific and include any cleanup method used. The method detection limit should be routinely checked for reasonableness.

(5) (No change.)

(6) The standard available method may either be a documented method from the U.S. EPA, American Society for Testing and Materials, other organizations nationally recognized as having scientifically acceptable methods, or the executive director, or a laboratory method that is completely documented in an appropriate Standard Operating Procedure. All methods derived by a laboratory must meet the quality control criteria recommended in U.S. EPA Test Methods for Evaluation of Solid Waste, Update III, as amended, unless the project and/or samples require less stringent quality control requirements than those recommended in U.S. EPA Test Methods for Evaluation of Solid Waste, Update III, as amended. Such projects or samples which require less stringent quality control shall be clearly identified and the rationale for lower levels of quality control shall be documented.

(A) Application of the method shall include the use of instrument calibration that brackets the value reported or includes a low standard that is below the necessary level of required performance, unless the method quantitation limit has been determined to be the necessary level of required performance in accordance with §350.78(c) of this title (relating to Determination of Critical Protective Concentration Levels). The calibration range shall yield results which demonstrate that the sample reporting level has not exceeded the necessary level of required performance after correction for sample weight or volume.

(B) (No change.)

(f) - (g) (No change.)

(h) The person shall:

(1) (No change.)

(2) report all non-detected results as less than the value of the sample detection [~~quantitation~~] limit; or

(3) (No change.)

(i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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SUBCHAPTER D. DEVELOPMENT OF PROTECTIVE CONCENTRATION LEVELS

30 TAC §§350.71, 350.73 - 350.77, 350.79

STATUTORY AUTHORITY

The amended rules are proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rules are proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rules is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendments implement TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.71. General Requirements.

(a) - (j) (No change.)

(k) For Tiers 1, 2, and 3 as explained in §350.75 of this title (relating to Tiered Human Health Protective Concentration Level Evaluation) and §350.77 of this title (relating to Ecological Risk Assessment and Development of Ecological Protective Concentration Levels), the person shall establish PCLs for each individual COC within each environmental medium unless the conditions of paragraphs (1), (2), [~~or~~] (3), or (4) of this subsection are met or unless the use of paragraphs (1), (2), [~~or~~] (3), or (4) of this subsection is prohibited by the individual program area listed in §350.2 of this title (relating to Applicability). For the purposes of determining whether a COC meets the conditions of paragraphs (1), (2), [~~or~~] (3), or (4) of this subsection, a COC should be considered detected in a particular environmental medium if the analytical measurement is greater than the method detection limit and the analytical response meets the qualitative identification criteria recommended in the analytical method.

(1) The COC is detected in at least one sample, but all detected COC concentrations and sample detection [~~quantitation~~] limits for the COC are less than the residential assessment level in the envi-

ronmental medium being evaluated under this paragraph, as well as in all other environmental media from which samples were collected.

(2) The COC is detected in at least one sample in the environmental medium, but the conditions described in one of subparagraphs (A) - (E) of this paragraph are met and all [any] nondetected results for the COC are less than the residential assessment level in the environmental medium being evaluated under this paragraph [meet the conditions described in §350.71(k)(3)].

(A) - (E) (No change.)

(3) The COC is known or is reasonably anticipated to be associated with historical or current activities conducted at the on-site property, but the COC is not detected in any sample in the environmental medium, and all sample detection limits for the COC are less than the residential assessment level for the environmental medium [or the person is required to comply with the conditions of this paragraph as a part of meeting the requirements of §350.71(k)(2), and the conditions in subparagraph (A) or (B) of this paragraph are met].

[(A) All sample limits are less than the residential assessment level for the environmental medium.]

[(B) The sample quantitation limits in some samples are greater than the residential assessment level for the environmental medium, but all of the conditions in clauses (i) - (vi) of this subparagraph are met:]

[(i) an appropriate analytical method was used;]

[(ii) the COC is not anticipated to be present in the environmental medium based on, but not limited to, source area information, knowledge of on-site historical operations, characteristics of the COC and affected property;]

[(iii) the sample quantitation limit(s) of the COC in critical samples are less than the method quantitation limit of the analytical method used;]

[(iv) the COC is not a companion or daughter product of a parent COC that cannot be eliminated under conditions in this section;]

[(v) no companion or daughter products to this parent COC are detected; and]

[(vi) without consideration of any physical or institutional controls, the exposure potential is low based on the nature of the source area, the nature of the COC, the use and conditions of the affected property, the nature of the groundwater, local water use, proximity to potential receptors, and any other appropriate site-specific factors affecting potential exposure to the COC should it be present.]

(4) The COC is not known or is not reasonably anticipated to be associated with historical or current activities conducted at the on-site property, and is not detected in any sample in the environmental medium.

§350.73. Determination and Use of Human Toxicity Factors and Chemical Properties.

(a) In all cases, the toxicity factors used must be protective of human health and the environment. The person shall use the most recent chronic human toxicity factors taken from the following [hierarchy of] sources (unless otherwise specified in §350.76 of this title (relating to Approaches for Specific Chemicals of Concern to Determine Human Health Protective Concentration Levels)). [The person shall use the source in paragraph (1) of this section and only if the relevant chronic human toxicity factor is not available in that source, proceed to the source in paragraph (2) of this section and, only if the toxicity factor is not available in that source, proceed in the same fashion through sources in paragraphs (3) - (6) of this subsection.] The most recent chronic human toxicity factors from the sources listed[, in order of hierarchy of sources] in paragraphs (1) - (7) [(1) - (6)] of this subsection [, which are most current] as of the submittal date of the SIN or the RAP are presumed to be protective of human health and the environment, unless a person rebuts this presumption by published credible authority. In addition, the executive director may determine during review of the RACR that a change in a toxicity factor since the submittal of the SIN or RAP has been of such a magnitude that the PCLs previously developed for a COC would clearly not be protective of human health and the environment, then the adequacy of the response action must be reevaluated. Likewise, if the executive director determines at any time that a subsequent change in a toxicity factor is of such a magnitude such that the proposed response action is no longer warranted to protect human health and the environment, then a response action based on that previous chronic toxicity factor consideration shall no longer be required.

(1) United States Environmental Protection Agency (EPA) [EPA] Integrated Risk Information System (IRIS);

(2) EPA Provisional Peer Reviewed Toxicity Values (i.e., Superfund Health Risk Technical Support Center;

(3) [(2)] EPA Health Effects Assessment Summary Tables;

(4) [(3)] EPA National Center for Environmental Assessment (i.e., Superfund Technical Support Center);

(5) [(4)] the TCEQ [TNRCC] Chronic Remediation-Specific Effects Screening Levels;

(6) [(5)] Agency [agency] for Toxic Substances and Disease Registry; and

(7) [(6)] other scientifically valid sources as approved by the executive director.

(b) If the executive director determines that it is necessary to evaluate COCs which do not have any human chronic toxicity factors provided in the sources listed in subsection (a) of this section, then the executive director will provide chronic toxicity factors. The person may provide toxicological information to the executive director for consideration in the derivation of the chronic toxicity factors. The person shall provide all toxicological data from any toxicological studies conducted for the person when such information is requested by the executive director. [The person shall use the TNRCC Chronic Remediation-Specific Effects Screening Level value as the reference concentration in evaluating the inhalation pathway for both residential and commercial/industrial land use in accordance with §350.75(i)(3), (6) and (8) of this title (relating to Tiered Human Health Protective Concentration Level Evaluation), and all chronic inhalation exposure pathways for which PCLs are established in accordance with §350.75(i)(5) and (11) of this title, but only in cases where neither a EPA unit risk factor nor a EPA reference concentration is available for that COC from the hierarchy list provided in subsection (a) of this section.]

(c) - (d) (No change.)

(e) The person shall use the COC chemical/physical parameter values for COCs provided in the following figure to calculate PCLs, unless the executive director approves the use of a more representative alternative value in accordance with paragraphs (1) and (2) of this subsection. For those COCs not included in the figure in this subsection, the person may provide chemical/physical information to the executive director for consideration in developing appropriate chemical/physical parameters.

Figure: 30 TAC §350.73(e)

[Figure: 30 TAC §350.73(e)]

(1) For Tiers 2 and 3, the person may determine property-specific soil pH in order to account for the high pH dependence of the soil-water partition coefficient (K_d) of inorganic compounds and the organic carbon-water partition coefficient (K_{oc}) of ionizing organic compounds. Once the property-specific pH is determined, the person shall apply subparagraphs (A) - (C) of this paragraph as applicable to determine pH-dependent K_d and K_{oc} values unless another appropriate method is approved by the executive director. The executive director may also approve the use of data from appropriately-conducted [~~leachate~~] tests [~~(e.g., SPLP)~~] in determining a site-specific K_d or K_{oc}.

(A) - (B) (No change.)

(C) The person shall use the following figure to determine the pH-dependent K_d value for the inorganic COCs listed.
Figure: 30 TAC §350.73(e)(1)(C)
[~~Figure: 30 TAC §350.73(e)(1)(C)~~]

(2) (No change.)

§350.74. Development of Risk-Based Exposure Limits.

(a) General requirement. The person shall use the criteria provided in subsections (b) - (j) of this section and the RBEL equations provided in the following figures, as applicable, to establish RBELs appropriate for the type of COC, the complete and reasonably anticipated to be completed exposure pathways, receptors, and land uses. The person shall establish RBELs for carcinogenic COCs and noncarcinogenic COCs using the default exposure factors provided in the following figure for residents and commercial/industrial workers, unless the executive director approves the use of alternate exposure factors in accordance with subsection (j) of this section.
Figure: 30 TAC §350.74(a)
[~~Figure: 30 TAC §350.74(a)~~]

(b) - (d) (No change.)

(e) Vegetable ingestion RBELs. The vegetable RBELs ($^{Abg Veg}RBEL_{Ing}$ and $^{Bg Veg}RBEL_{Ing}$) are the protective concentration of a COC in aboveground vegetables and below-ground vegetables, respectively, for ingestion by residents. The person shall establish RBELs for ingestion of aboveground vegetables for all carcinogenic and noncarcinogenic COCs which are metals. In addition, the person shall establish RBELs for ingestion of below-ground vegetables for all carcinogenic and noncarcinogenic COCs with a dimensionless Henry's Law Constant less than 0.03, as shown in the figure in §350.73(e) of this title (relating to Determination and Use of Human Toxicity Factors and Chemical Properties), when either of the following criteria are met:

(1) - (2) (No change.)

(f) - (g) (No change.)

(h) Surface water RBEL. The surface water RBEL ($^{SW}RBEL$) is the protective concentration of a COC at the POE in surface water. To establish $^{SW}RBEL$ for a COC, the person shall determine the lowest value from paragraphs (1) - (5) [~~(4)~~] of this subsection for each COC, unless the person has sufficient surface water quality information specific to the particular surface water body to support an adjustment to the RBEL in accordance with paragraph (6) [~~(5)~~] of this subsection. The $^{SW}RBEL$ value determined pursuant to paragraphs (1) - (6) [~~(5)~~] of this subsection may require modification in response to the requirements of paragraphs (7) and (8) [~~(6) and (7)~~] of this subsection. The $^{SW}RBEL$ value for a given COC shall be protective of relevant downgradient water bodies in consideration of the water body use (e.g., designated drinking water supply or sustainable fishery), the water body type (e.g., estuary or perennial freshwater stream), the standards applicable to the type of water body/use, and the fate and transport characteristics of the COC in question at the particular affected property.

(1) (No change.)

(2) The person shall apply the human health criteria to protect drinking water and fisheries as provided in Table 3 of §307.6 of this title [~~(relating to Toxic Materials)~~], as amended. When applicable, the person shall convert total metal concentrations in surface water or groundwater to dissolved concentrations as described in the agency's *Implementation Procedures*, as amended. The person shall determine the applicability of human health criteria according to the water body uses (e.g., public water supply, sustainable fishery, incidental fishery, and contact recreation) in accordance with the procedures contained in §307.3 and §307.6 of this title [~~(relating to Definitions and Abbreviations, and Toxic Materials, respectively)~~], as amended, and the *Implementation Procedures*, as amended. When a water body is not being evaluated as a drinking water source, the person must determine the necessity to evaluate exposure pathways associated with contact recreation such as incidental ingestion of surface water and dermal contact with surface water. The person shall use the total suspended solids concentration for the nearest classified segment, as listed in the agency's *Implementation Procedures*, as amended.

(3) The person shall apply the effluent limitations specified in Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXG830000, as amended, for any release of groundwater or storm water that has been impacted by petroleum fuel (as defined in the general permit) [~~limits for discharges to surface waters of petroleum fuel contaminated waters as specified in Chapter 321, Subchapter H of this title (relating to Discharge to Surface Waters from Treatment of Petroleum Fuel Substance Contaminated Waters), as amended~~].

(4) The person shall apply United States [~~U.S.~~] EPA guidelines or alternate provisions in accordance with §307.6(c)(7) of this title [~~(relating to Toxic Materials)~~], as amended, when criteria for aquatic life protection are not provided for a COC in §307.6 of this title, Table 1, as amended. In addition, the person shall apply federal guidance criteria (i.e., lower of a federal numerical criterion, MCL, or equivalent state drinking water guideline) or alternate provisions [~~for surface waters~~] in accordance with §307.6(d)(8) of this title [~~(relating to Toxic Materials)~~], as amended, when human health criteria for a COC are not provided in Table 3 of §307.6 of this title, as amended.

(5) The person shall apply the numerical criteria for chlorides, sulfates, total dissolved solids, and pH for classified segments as specified in §307.10, Appendix A of this title (relating to Appendices A - E), as amended.

(6) [~~(5)~~] The person may apply additional provisions where data on surface water quality for a specific surface water body at the affected property is available or can be reasonably obtained.

(A) The person may determine property-specific hardness, based on sampling data, for calculating metals criteria in accordance with the procedures contained in the agency's *Implementation Procedures*, as amended.

(B) The person may determine property-specific total suspended solids, based on sampling data, for estimating "dissolved" metals in accordance with the *Implementation Procedures*, as amended.

(C) The person may determine the actual pH of the particular surface water body at the affected property.

(7) [~~(6)~~] The additional numeric and narrative criteria listed in subparagraphs (A) and (B) [~~- (C)~~] of this paragraph may require development of a surface water RBEL (e.g., where a nutrient is a COC) or modification to the surface water RBEL (e.g., lower a RBEL value to minimize foaming on the water's surface) determined pursuant to paragraphs (1) - (5) of this subsection.

(A) General criteria related to aesthetic parameters, nutrient parameters, and salinity in accordance with §307.4(b), (e), and (g) of this title (relating to General Criteria), as amended.

[(B) Numerical criteria for chlorides, sulfates, total dissolved solids, and pH for classified segments as specified in §307.10, Appendix A of this title (relating to Appendices A - E), as amended.]

(B) [(C)] General provisions related to the preclusion of adverse toxic effects on aquatic and terrestrial life, livestock, or domestic animals in accordance with §307.6(b) of this title, as amended.

(8) [(7)] If the executive director determines that the release has the potential to lower the surface water dissolved oxygen, then the executive director may require the person to apply the dissolved oxygen criteria for classified segments specified in §307.10, Appendix A of this title (relating to Appendices A - E), as amended, or the dissolved oxygen criteria for unclassified waters specified in §307.10, Appendix D of this title, as amended, §307.4(h) of this title (relating to General Criteria), as amended, and §307.7(b)(3)(A) of this title (relating to Site Specific Uses and Criteria), as amended.

(i) Aesthetics. For COCs for which a RBEL cannot be calculated by the procedures of this section, or the RBEL concentration for the COC otherwise adversely impacts environmental quality or public welfare and safety, presents objectionable characteristics (e.g., taste, odor), or makes a natural resource unfit for use, the person shall comply with paragraphs (1) - (3) of this subsection as appropriate. For response actions which are triggered for an area solely for purposes of this subsection (i.e., there is no other human health or ecological hazard remaining), the executive director will evaluate the seriousness, probable longevity of the matter, and suitability of the proposed remedy with the landowner in order to site-specifically determine whether or not institutional controls and financial assurance are warranted. The person shall provide all information reasonably necessary to support such a determination to the executive director. The default presumption is that financial assurance and institutional controls are required for exposure prevention remedies. If the executive director determines that institutional controls and financial assurance are not warranted, then persons shall not be required to comply with the provisions of §350.31(g), §350.33(e)(2)(C) and §350.111(b)(3) or (6) of this title (relating to General Requirements for Remedy Standards, Remedy Standard B, and Use of Institutional Controls), specifically relating to the physical control matters for the portion of affected property with the aesthetics issue.

(1) - (3) (No change.)

(j) Requirements for variance to default RBEL exposure factors.

(1) (No change.)

(2) Under Tiers 2 or 3 as provided in §350.75 of this title (relating to Tiered Human Health Protective Concentration Level Evaluation), a person may request that the executive director allow a variance to the following default commercial/industrial exposure factors for the affected property as shown in the figure in subsection (a) of this section: averaging time for noncarcinogens (AT.w), exposure duration (ED.w), and exposure frequency (EF.w). This shall only be allowed for facilities that have or will have, as a condition of the approval of this variance, restricted property access. The executive director shall not delegate this decision to agency staff.

(A) (No change.)

(B) The person requesting such variance shall provide public notification as described in subparagraphs (D) and (E) of this paragraph for any request to vary the default exposure factors at the same time that variance-based PCLs are submitted to the executive director for approval. If the natural physical condition of the on-site commercial/industrial area for which the variance is sought essentially prohibits full commercial/industrial use (e.g., marshes and cliffs), and the variance would not necessitate a lesser commercial/industrial use of that area, then the executive director will determine the need for public notice on a site-specific basis for the prohibited use area. The person may request the executive director or his staff to review the variance-based PCLs or the variance request for completeness (e.g., administratively complete, mathematical accuracy, compliance with other PCL development procedures) in advance of initiating the public notification process. The required public notice shall be completed prior to consideration of the variance request for approval by the executive director. The public notice provisions may be performed in conjunction with or as part of another public participation/notification process required for permitting or other applicable state or federal statute or regulation provided the requirements of subparagraph (E) of this paragraph are also met. Additionally, an alternative mechanism that may exist under the other public participation/notification process which effectively provides broad public notice of the variance request, such as notification to an existing citizens' [citizens] advisory board for the affected property/facility, may substitute for the requirements of subparagraph (D) of this paragraph, provided the completion of the notification is sufficiently documented.

(C) - (K) (No change.)

(L) A person who receives a variance from the default exposure factors shall comply with the institutional control requirements in §350.111(b), (b)(12), or (13) of this title (relating to Use of Institutional Controls), as applicable, and provide proof of compliance with the institutional control requirements within 90 days of the approval by the executive director of the RACR.

(3) (No change.)

§350.75. Tiered Human Health Protective Concentration Level Evaluation.

(a) (No change.)

(b) Tier 1 PCLs.

(1) Tier 1 is a risk-based analysis to derive non-site-specific PCLs for complete or reasonably anticipated to be completed exposure pathways. Tier 1 is based on default exposure factors and affected property parameters in the applicable PCL equations provided in the following figure and assumes exposure occurs at, above or below the source area (i.e., no lateral transport).
Figure: 30 TAC §350.75(b)(1)
[Figure: 30 TAC §350.75(b)(1)]

(2) - (4) (No change.)

(c) - (h) (No change.)

(i) Pathway specific PCL Considerations.

(1) - (3) (No change.)

(4) PCLs for COCs in groundwater discharge to surface water (^{sw}GW). The person shall set ^{sw}GW equal to ^{sw}SW divided by the surface water dilution factor. The ^{sw}SW is the lesser of the ^{sw}RBEL [^{sw}RBEL] established in accordance with §350.74(h) of this title (relating to Development of Risk-Based Exposure Limits) and the SW_{Eco} established in accordance with §350.77 of this title (relating to Ecological Risk Assessment and Development of Ecological Protective Concentration Levels). The surface water dilution factor shall be determined [, or as modified] in accordance with subparagraph (A) or (B) [, (C), (D), or (E)] of this paragraph. The person shall use the PCL equation as shown in the figure in subsection (b)(1) of this section to establish

^{SW}GW. [~~The person shall determine if the affected water body is freshwater or marine in order to apply applicable aquatic life and/or human health criteria listed in Tables 1 and 3 of §307.6 of this title (relating to Toxic Materials), as amended.~~]

(A) The person shall assume a surface water dilution factor of one when the concentration of all COCs in groundwater at the zone of discharge to surface water is less than or equal to the ^{SW}SW [~~^{sw}RBEL~~] for those COCs at the time the affected property assessment required in §350.51 of this title (relating to Affected Property Assessment) is conducted. The person shall also assume a surface water dilution factor of one for those specific COCs which are listed as impairing the nearest classified segment at or downstream of the affected property. Impaired water bodies are provided in the current Clean Water Act, §303(d) list, as amended.

(B) When the concentration of a COC in groundwater at the zone of discharge to surface water exceeds the ^{SW}SW [~~^{sw}RBEL~~] for that COC at the time the affected property assessment required in §350.51 of this title (relating to Affected Property Assessment) is conducted, the person may establish a surface water dilution factor in accordance with subparagraph [~~subparagraphs~~] (C), (D), or (E) of this paragraph.

(C) The person may use [~~divide the ^{sw}RBEL by~~] a surface water dilution factor of 0.15 for non-flowing surface waters such as lakes, estuaries, tidal rivers; and fresh water streams and rivers (where the groundwater discharge is clearly less than 15% of the 7Q2 stream flow as defined in §307.3(a)(34) of this title (relating to Definitions and Abbreviations)), as amended. The person shall use the 7Q2 flows as listed in Appendix B of §307.10 of this title (relating to Appendices A - E), as amended, for groundwater discharges directly to a classified segment as listed in Appendix C of §307.10 of this title, as amended. For groundwater discharges which are not directly to a classified segment, site-specific 7Q2 values must be determined for the water body directly receiving the groundwater discharge.

(D) For freshwater streams and rivers where the groundwater discharge is clearly greater than 15% of the 7Q2 flow, the person shall estimate property-specific surface water dilution factors based on 7Q2 flows for chronic aquatic-life criteria, 25% of 7Q2 flows for acute aquatic-life criteria, and harmonic mean flows as defined in §307.3(a)(19) of this title (relating to Definitions and Abbreviations), as amended, for human health criteria in accordance with the procedures contained in the *Implementation Procedures*, as amended. The person shall divide the ^{SW}SW [~~^{sw}RBEL~~] by the estimated property-specific dilution factor. The person shall use the 7Q2 flows listed in Appendix B of §307.10 of this title (relating to Appendices A - E), as amended, for groundwater discharges directly to a classified segment as listed in Appendix C of §307.10 of this title, as amended. For groundwater discharges which are not directly to a classified segment, site-specific 7Q2 values must be determined for the water body directly receiving the groundwater discharge.

(E) - (F) (No change.)

(5) - (15) (No change.)

(j) (No change.)

§350.76. Approaches for Specific Chemicals of Concern to Determine Human Health Protective Concentration Levels.

(a) - (b) (No change.)

(c) Lead.

(1) The Tier 1 residential soil PCL ($^{Tot}Soil_{Comb}$) for lead [~~for all three tiers~~] is 500 mg/kg.

(2) Subject to prior approval by the executive director, the person may use property-specific data in conjunction with a lead model approved by the executive director (e.g., EPA Integrated Exposure Uptake Biokinetic model for lead in children) to calculate a Tier 3 residential soil PCL ($^{Tot}Soil_{Comb}$) for lead. The person shall submit information to the executive director which demonstrates that variance from default model inputs is supported by property-specific information (e.g., data from a scientifically valid bioavailability study using property-specific soils). Property-specific model input values must be approved by the executive director.

(3) [~~(2)~~] The commercial/industrial soil PCL ($^{Tot}Soil_{Comb}$) is based only on the soil ingestion pathway ($^{Soil}Soil_{Ing}$). The person shall use the exposure algorithm and default exposure factors in the following figure for calculating the Tier 1 commercial/industrial $^{Soil}RBEL_{Ing}$ value.

Figure: 30 TAC §350.76(c)(3)

[~~Figure: 30 TAC §350.76(c)(2)~~]

(4) [~~(3)~~] The person may use a different exposure algorithm as presented in the following figure that considers soil and dust separately for calculating the Tier 2 and 3 commercial/industrial $^{Soil}RBEL_{Ing}$ value in cases where the person has adequate direct measurement data on the concentrations of lead in both soil and dust at the affected property. In addition, in calculating Tier 2 or 3 $^{Soil}RBEL_{Ing}$ values, the person may deviate from the default exposure factors as shown in the figure in paragraph (3) [~~(2)~~] of this subsection and the following figure if property-specific or defensible alternative data (e.g., from open literature or privately funded studies) adequately support such an approach. The specific exposure factors for which the person may use property-specific or scientifically defensible alternative values are the following:

Figure: 30 TAC §350.76(c)(4)

[~~Figure: 30 TAC §350.76(c)(3)~~]

(A) individual geometric standard deviation (GSD_i);

(B) baseline blood lead (PbBO);

(C) absolute absorption fraction of lead in soil/dust (Afsd);

(D) absolute absorption fraction of lead in soil (AFs); and

(E) absolute absorption fraction of lead in dust (Afd).

(d) Polychlorinated Biphenyls.

(1) (No change.)

(2) For Tiers 2 and 3, the person may use alternative slope factors when the following conditions are met:

(A) (No change.)

(B) The person may conduct congener or isomer analyses. The person may use the lowest reference point of the upper-bound slope factors (0.07 $(mg/kg\text{-}day)^{-1}$) for the soil ingestion, dermal contact with soil, and inhalation exposure pathways if congener or isomer analyses verify that congeners with more than four chlorines comprise less than one-half percent of total polychlorinated biphenyls in a given exposure medium. The upper reference point of the upper-bound slope factors (2 $(mg/kg\text{-}day)^{-1}$) shall be used for all other exposure pathways regardless of the results of the congener- or isomer-specific analyses. If congener or isomer analyses indicate that congeners with more than four chlorines comprise greater than one-half percent of total polychlorinated biphenyls in a given exposure medium, then the person shall use the upper-reference point of the upper-bound slope factors (2 $(mg/kg\text{-}day)^{-1}$) for all pathways for that specific exposure medium. Further, when congener concentrations are available, the contribution of

dioxin-like polychlorinated biphenyls to total dioxin equivalents shall be considered. The person shall apply the toxicity equivalency factors specified in the following figure to the measured [~~soil~~] concentrations for each of the dioxin-like polychlorinated biphenyls. These values shall then be summed to obtain a 2,3,7,8-TCDD toxicity equivalency quotient. Toxicity equivalency quotients for dioxin-like polychlorinated biphenyls shall then be added to those for other dioxin-like compounds as specified in subsection (e) of this section to yield a total toxicity equivalency quotient concentration. This total toxicity equivalency quotients concentration shall then be compared with the critical [~~soil~~] PCL for TCDD, 2,3,7,8- (dioxin). When addressing dioxin-like polychlorinated biphenyls in this manner, the person shall subtract the concentration of dioxin-like polychlorinated biphenyls from the total polychlorinated biphenyls concentration to avoid overestimating dioxin-like polychlorinated biphenyls by evaluating them twice.
Figure: 30 TAC §350.76(d)(2)(B) (No change.)

(3) - (4) (No change.)

(e) Polychlorinated Dibenzo-p-Dioxins and Dibenzofurans.

(1) In demonstrating attainment of the critical [~~soil~~] PCL for TCDD, 2,3,7,8- (dioxin), the person shall apply the toxicity equivalency factor as shown in the figure in subsection (d)(2)(B) of this section to the measured [~~soil~~] concentrations in accordance with the following procedures.

(A) When analytical data are only available for total dioxins/furans, the person shall assume that the mixture consists solely of 2,3,7,8-TCDD, and a toxicity equivalency factor value of 1.0 shall be applied to the measured [~~soil~~] concentration to yield the 2,3,7,8-TCDD toxicity equivalency quotient concentration for the [~~soil~~] sample.

(B) When homologue-specific analytical data are available (e.g., tetrachlorodibenzodioxins), the person shall assume that each homologue class is comprised solely of 2,3,7,8-substituted congeners, and the toxicity equivalency factor specified for the 2, 3, 7, 8-substituted congeners in the homologue class shall be applied to the measured [~~soil~~] concentrations for that homologue class. A toxicity equivalency factor value of 0.5 should be used for the pentachlorodibenzofuran homologue class. The toxicity equivalency quotient concentrations for each homologue class shall be summed to obtain a total toxicity equivalency quotient concentration for the [~~soil~~] sample.

(C) When congener-specific analytical data are available (e.g., 1, 2, 3, 4, 7, 8-hexachlorodibenzofuran), the person shall apply the toxicity equivalency factor for the 2, 3, 7, 8-substituted congeners to the measured [~~soil~~] concentrations. The toxicity equivalency quotient concentrations for each 2, 3, 7, 8-substituted congener shall then be summed to obtain a total toxicity equivalency quotient concentration for the [~~soil~~] sample.

(2) The person shall then compare the total toxicity equivalency quotient [~~soil~~] concentration established in paragraph (1) of this subsection to the critical [~~soil~~] PCL for TCDD, 2, 3, 7, 8- (dioxins).

(3) (No change.)

(f) Polycyclic Aromatic Hydrocarbons.

(1) - (2) (No change.)

(3) The cancer slope factors and inhalation unit risk factors for the seven carcinogenic polycyclic aromatic hydrocarbons, shall be calculated according to the equations set forth in the following figure:
Figure: 30 TAC §350.76(f)(3)
[~~Figure: 30 TAC §350.76(f)(3)~~]

(4) - (5) (No change.)

(g) Total Petroleum Hydrocarbons.

(1) (No change.)

(2) In order to establish PCLs for total petroleum hydrocarbons, the person shall establish PCLs for each of the aliphatic and aromatic hydrocarbon fractions listed in the following figure (e.g., aliphatic $>C_6$-C_8) for the mandatory and complete or reasonably anticipated to be completed exposure pathways as required in §350.71(c) of this title (relating to General Requirements):
Figure: 30 TAC §350.76(g)(2)
[~~Figure: 30 TAC §350.76(g)(2)~~]

(3) - (8) (No change.)

§350.77. Ecological Risk Assessment and Development of Ecological Protective Concentration Levels.

(a) General. The person shall evaluate the affected property by conducting an ecological risk assessment in a manner appropriate and consistent with subsections (b), (c), or (d) of this section. The process is discussed in the agency's ecological risk assessment guidance. The purpose of the ecological risk assessment will be to characterize the ecological setting of the affected property, identify complete or reasonably anticipated to be completed exposure pathways and representative ecological receptors, scientifically eliminate COCs that pose no unacceptable risk, and develop PCLs for selected ecological receptors where warranted. The POEs for the selected ecological receptors shall be established on a property-specific basis. However, if the person can show that no unacceptable ecological risk exists due to incomplete or insignificant exposure pathways as specified in subsection (b) of this section, or if all COCs can be eliminated as specified in subsection (c)(1), (6), (7), or (8) of this section, or if, after incorporation of site-specific information, it can be shown that there is either no ecological risk or that it is not apparent as specified in subsection (d) of this section, then the ecological risk assessment process will terminate at that point. Also, if after the ecological risk assessment process specified in subsection (b) of this section, or if at anytime during the ecological risk assessment process specified in subsections (c) or (d) of this section, the person can demonstrate to the satisfaction of the executive director that the [~~either~~] implementation of a [~~physical control (e.g., a cap) planned as part of a~~] response action [~~to address the exceedence of human health-based PCLs~~] will eliminate the ecological exposure pathway or render it insignificant, or that human health PCLs will be protective of ecological receptors, then no further ecological risk assessment evaluation will be required. In addition, if after the ecological risk assessment process specified in subsection (b) of this section, the person can demonstrate to the satisfaction of the executive director that an expedited stream evaluation can determine that the completed surface water and sediment pathways are insignificant, then no further ecological risk assessment evaluation will be required. If no further ecological risk assessment evaluation is required, then the person shall provide, as appropriate, a reasoned justification and/or an expedited stream evaluation for terminating the ecological risk assessment and place this information in the affected property assessment report as described in §350.91 of this title (relating to Affected Property Assessment Report). Furthermore, after ecological PCLs have been established, the person shall have the option, where determined appropriate, of conducting an ecological services analysis as a means of managing ecological risk at the affected property, in accordance with subsection (f) of this section and §350.33(a)(3)(B) of this title (relating to Remedy Standard B). Subsections (b), (c), and (d) of this section describe a three-tiered approach to conducting an ecological risk assessment, and although there is a logical progression from one tier to the next, the person may begin the ecological evaluation of the affected property at any tier.

(b) Tier 1: exclusion criteria checklist. The person shall conduct a Tier 1 assessment at all affected properties to which this rule is applicable as presented in §350.2 [§350.(2)] of this title (relating to Applicability), unless the person elects to begin the ecological evaluation at Tier 2 or Tier 3. The person shall use the Tier 1 Exclusion Criteria Checklist provided in the following figure. The person will have fulfilled the ecological risk assessment requirements if the affected property meets the exclusion criteria. However, the person shall re-enter the ecological risk assessment process if changing circumstances result in the affected property not meeting the Tier 1 exclusion criteria. The person is required to continue the ecological risk assessment process as described in subsection (c) or (d) of this section if the affected property fails the exclusion criteria, unless the reasoned justification and/or expedited stream evaluation processes described in subsection (a) of this section are used to demonstrate that no unacceptable ecological risk exists.

Figure: 30 TAC §350.77(b)

[Figure: 30 TAC §350.77(b)]

(c) Tier 2: screening-level ecological risk assessment. The person shall conduct a screening-level ecological risk assessment to scientifically eliminate COCs that do not pose an ecological risk and to develop PCLs for those COCs that do pose an unacceptable risk to selected ecological receptors. Effect levels and exposure factors from the literature are used as early input, but Tier 2 PCLs are not developed without consideration of realistic assumptions and available site-specific information. The screening-level ecological risk assessment should contain the three following widely-acknowledged phases of an ecological risk assessment: problem formulation, which establishes the goals, breadth, and focus of the assessment; analysis, which consists of the technical evaluation of data on both the exposure of the ecological receptor to a chemical stressor and the potential adverse effects; and risk characterization, where the likelihood of adverse effects occurring as a result of exposure to a chemical stressor is evaluated. In order to develop a screening-level ecological risk assessment which appropriately evaluates ecological risk, the person shall meet the minimum requirements listed in paragraphs (1) - (10) of this subsection. Additional information on these requirements, as well as case examples, are [may be] provided in the agency's ecological assessment guidance [a guidance document developed by the executive director]. The person shall:

(1) - (6) (No change.)

(7) justify the use of less conservative assumptions (e.g., a larger home range) to adjust the exposure and repeat the hazard quotient exercise in paragraph (6) of this subsection, once again eliminating COCs that pose no unacceptable risk based on comparisons to the NOAELs and adding another set of comparisons, this time to the LOAELs, for those COCs indicating a potential risk (i.e., NOAEL hazard quotient >1); however, when multiple members of a class of COCs are present which exert additive effects, it is also appropriate to utilize an ecological hazard index methodology (if all COCs are eliminated at this point, the ecological risk assessment process ends and the items listed in paragraphs (8) and (9) [(8) - (9)] of this subsection are not required);

(8) (No change.)

(9) calculate medium-specific PCLs bounded by the NOAEL and the LOAEL used in paragraph (7) of this subsection for those COCs that [which] are not eliminated as a result of the hazard quotient exercises or the uncertainty analysis; and

(10) (No change.)

(d) - (f) (No change.)

§350.79. Comparison of Chemical of Concern Concentrations to Protective Concentration Levels.

The person shall follow the procedures of this subsection to determine if a response action under this chapter is necessary to protect human health and the environment, and if a response action is necessary, then to determine if the remedy standard is attained. If the person satisfactorily demonstrates that all reasonably available analytical technology (e.g., selected ion monitoring) has been used to show that the COC cannot be measured to the method quantitation limit due to sample specific interferences, then the person shall be allowed to determine attainment based on the sample detection [quantitation] limit. The person shall make these determinations using the procedures described in either paragraph (1) or (2) of this subsection.

(1) - (2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. REPORTS

30 TAC §§350.90 - 350.96

STATUTORY AUTHORITY

The amended rules and new section are proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state, TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rules and new section are proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and

convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rules is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendments and new section implement TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.90. Spatial and Electronic Information.

(a) When required, the person shall provide accurate spatial coordinates and associated data attributes that are reported in a format approved or required by the executive director.

(b) Reports shall be submitted in a format, including an electronic format, and according to a schedule established by the executive director.

§350.91. Affected Property Assessment Report.

(a) The person shall include the contact and identifications as described in paragraphs (1) - (3) of this subsection in an affected property assessment report (APAR):

(1) - (2) (No change.)

(3) the physical address or location of the affected property, including [~~an~~] accurate latitude and longitude and associated spatial data attributes in a format approved or required by the executive director.

(b) An APAR shall document descriptions of procedures and conclusions of the assessment and shall include all information required to meet the requirements of §350.51 of this title (relating to Affected Property Assessment), §350.52 of this title (relating to Groundwater Resource Classification) and §350.53 of this title (relating to Land Use Classification). This includes, but is not limited to:

(1) - (5) (No change.)

(6) an identification of all complete or reasonably anticipated to be completed exposure pathways, and an identification of other exposure pathways evaluated in accordance with §350.71(c)(8) of this title (relating to General Requirements) and an explanation of why those pathways were not considered to be complete or reasonably [~~reasonablely~~] anticipated to be completed;

(7) as required, a completed Tier 1 Exclusion Criteria Checklist and, if appropriate, a reasoned justification and/or an expedited stream evaluation for terminating the ecological risk assessment, or as required a Tier 2 screening-level ecological risk assessment, and/or a Tier 3 site-specific ecological risk assessment as specified in §350.77 of this title (relating to Ecological Risk Assessment and Development of Ecological Protective Concentration Levels);

(8) - (13) (No change.)

(14) a description of any exposure conditions which require notice under §350.55(e) of this title (relating to Notification Requirements) and any certification required under §350.55(d) and (e) of this title; [~~and~~]

(15) accurate spatial coordinates and associated data attributes, in a format approved or required by the executive director, for all locations where samples of environmental media were collected or where other testing was conducted (e.g., water wells and monitor wells which were sampled or which were used for aquifer testing, soil sampling locations, surface water and sediment sampling locations, and air sampling locations); and

(16) [~~(15)~~] any other reasonable information required by the executive director.

[~~(c) The APAR shall be submitted in a format and according to a schedule established by the executive director.~~]

§350.92. Self-Implementation Notice.

[~~(a)~~] The person shall include the following information in a self-implementation notice (SIN):

(1) the person shall include the following contact and identifications:

(A) the name, mailing address, and telephone number of the contact person or office for the on-site affected property;

(B) the program and identification numbers for the project, if any (e.g., Solid Waste Registration number, Leaking Petroleum Storage Tank identification number, Voluntary Cleanup Program number, etc.); and

(C) the physical address or location of the affected property;

(2) a list of the COCs which require a response action;

(3) a description of the qualitative and quantitative response action objectives to be achieved by the response action;

(4) a description of any exposure conditions which require notice under §350.55(e) of this title (relating to Notification Requirements) and any certification required under §350.55(d) and (e) of this title;

(5) a description of the response action chosen to achieve Remedy Standard A;

(6) acknowledgment that any permits needed to implement the remedy will be obtained prior to implementation;

(7) a schedule for implementation and completion of the response action;

(8) if applicable, a copy of the proposed institutional control for §350.31(h)(1) of this title (relating to General Requirements for Remedy Standards); and

(9) any other reasonable information required by the executive director.

[~~(b) The SIN shall be submitted in a format established by the executive director.~~]

§350.93. Response Action Effectiveness Report.

[~~(a)~~] The person shall include the following information in a response action effectiveness report (RAER):

(1) a summary of the response actions taken since the last reporting period;

(2) for each environmental medium, a comparison among the critical PCL; the initial concentration of COCs; and the current (i.e., at the time of RAER submittal) concentrations of COCs;

(3) an estimate of the percentage of the response action which has been completed;

(4) an estimate in years of the additional time necessary to complete the response actions;

(5) a determination whether sufficient progress is being made to achieve the selected remedy standard within a reasonable time frame given the particular circumstances of an affected property;

(6) if applicable, a copy of the proposed institutional control for §350.31(h) of this title (relating to General Requirements for Remedy Standards); and

(7) any other reasonable information required by the executive director.

[~~(b) The RAER shall be submitted in a format established by the executive director.~~]

§350.94. Response Action Plan.

(a) - (l) (No change.)

[~~(m) The person shall submit the RAP in a format specified by the executive director.~~]

§350.95. Response Action Completion Report.

(a) (No change.)

(b) When the person selects Remedy Standard A, the RACR shall include information which documents that the requirements for response actions stated in §350.31 and §350.32 of this title (relating to General Requirements for Remedy Standards and Remedy Standard A, respectively) have been fulfilled. When applicable, the [~~The~~] report shall also include a copy of the document that the person proposes to use to fulfill the institutional control requirements of §350.31(g) of this title (relating to General Requirements for Remedy Standards), §350.51(1), (3), or (4) of this title (relating to Affected Property Assessment), and §350.74(b)(1) or (j)(2) of this title (related to Development of Risk-Based Exposure Limits) when the affected property has been restored for commercial/industrial use.

(c) (No change.)

(d) In situations where soils which contain COCs are relocated for reuse in accordance with §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes), the person shall also provide:

(1) documentation of the prior written landowner consent required in §350.36(d) of this title (relating to Relocation of Soils Containing Chemicals of Concern [~~COCs~~] for Reuse Purposes) for soil reuse on property not owned by the person; and

(2) (No change.)

(e) (No change.)

[~~(f) The person shall submit the RACR in a format established by the executive director.~~]

§350.96. Post-Response Action Care Reports.

[~~(a)~~] The person shall include the following information in a post-response action care report [~~reports~~] (PRACR):

(1) the results of any monitoring program with all analytical data prepared and presented in accordance with §350.54 of this title (relating to Data Acquisition and Reporting Requirements);

(2) a summary of activities related to the inspection, operation, and maintenance of physical controls;

(3) a discussion of any corrective actions taken in response to failure of institutional and/or physical controls; and

(4) any other reasonable information required by the executive director.

[~~(b) The person shall submit PRACRs in a format established by the executive director.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. INSTITUTIONAL CONTROLS

30 TAC §350.111

STATUTORY AUTHORITY

The amended rule is proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rule is proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rule is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances

in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendment implements TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.111. Use of Institutional Controls.

(a) Whenever required by this chapter, the person or landowner shall file a copy of the appropriate deed notice, VCP certificate of completion or restrictive covenant in the real property records of the county in which the property is located to notify future owners of any limitations on the use of the property. Deed notices, VCP certificates of completion and restrictive covenants shall include the following information:

(1) - (6) (No change.)

(7) the TCEQ [~~TNRCC~~] Program and identifier number, and the availability of more detailed information at or through the TCEQ [~~TNRCC~~] Central Records Office or Web Site; and

(8) the physical address and mailing address for the TCEQ [~~TNRCC~~] Central Records Office.

(b) (No change.)

(c) The person shall submit a written request to the landowner to obtain permission to file the deed notice or VCP certificate of completion or to solicit agreement to have an innocent landowner execute a restrictive covenant. This written request must contain a copy of the proposed deed notice, VCP certificate of completion or restrictive covenant, the address and phone number of the commission's Public Interest Counsel as someone the landowner may contact, and a clear explanation as to the content and purpose of the institutional control. The [~~Except for subsections (b)(4), (d), and (f) of this section, the~~] person shall obtain written consent from the landowner for the filing of the deed notice or VCP certificate of completion prior to filing of a deed notice or VCP certificate of completion required to be filed under this chapter in the real property records unless the person is a governmental entity that is not a responsible party or subsections (b)(4), (d), or (f) of this section apply. Restrictive covenants shall be executed only by the landowner. A restrictive covenant in favor of TCEQ [~~TNRCC~~] and the State of Texas which runs with the land shall be the required institutional control with the exception of institutional controls required under §350.31(h) and §350.74(b)(1) of this title (relating to General Requirements for Remedy Standards and Development of RiskBased Exposure Limits, respectively) unless information is presented which demonstrates that:

(1) (No change.)

(2) it is technically impracticable to obtain a residential-based Remedy Standard A response action and an innocent landowner refuses to execute a restrictive covenant, or a noninnocent landowner refuses to consent to the filing of a deed notice or VCP certificate of completion; a court of competent jurisdiction has determined the amount of compensation due the landowner as compensation for filing a deed notice or VCP certificate of completion in the real property records for that property; and the person has paid into the court registry compensation, if any, determined by the court, in which case the person shall file a deed notice or VCP certificate of completion; [~~or~~]

(3) after extensive and diligent inquiry by the person, the executive director concludes that the landowner cannot be found, in which case the person shall file a deed notice or VCP certificate of completion; or [~~,~~]

(4) the person is a governmental entity that is not a responsible party, and the innocent landowner refuses to execute a restrictive covenant.

(d) (No change.)

(e) The person shall provide a copy of the request for landowner consent for filing of a deed notice or VCP certificate of completion or copy of the request for the innocent landowner to execute a restrictive covenant, and proof of the date of receipt by the landowner of the request, with the RACR, unless required earlier in accordance with §§350.33(f)(2), (f)(3)(F) [~~(f)(3)(E)~~], or (f)(4)(C) of this title (relating to Remedy Standard B). Proof of written landowner consent for the filing of deed notice or a VCP certificate of completion or the written agreement of the innocent landowner to execute a restrictive covenant shall be provided to the executive director before the executive director will approve the RACR, unless the provisions in subsections (b)(4), (d) or (f) of this section are met.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. ESTABLISHING A FACILITY OPERATIONS AREA

30 TAC §350.134

STATUTORY AUTHORITY

The amended rule is proposed under the following statutory authority: TWC, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; TWC, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and THSC, Texas Solid Waste Disposal Act, §361.017 and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the amended rule is proposed under TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances

and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; TWC, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and TWC, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in TWC, §26.262. Authority to adopt the amended rule is also provided by TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in TWC, §26.341; and TWC, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

The proposed amendment implements TWC, §§5.103, 26.011, 26.039, 26.262, 26.264, 26.341, 26.345, and 26.401, and THSC, §§361.017, 361.024.

§350.134. Qualifying Criteria.

(a) (No change.)

(b) Other criteria that may be considered include, but are not limited to, the risk to human health and the environment that would be presented by the granting of a FOA, [. ~~In addition, such factors as~~] the compliance history of the facility determined in accordance with Chapter 60 of this title (relating to Compliance History), as amended, and any other pertinent information [~~shall also be considered~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604754
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 239-6087

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 4. RIGHTS AND PROTECTION OF INDIVIDUALS RECEIVING MENTAL RETARDATION SERVICES

SUBCHAPTER C. RIGHTS OF INDIVIDUALS WITH MENTAL RETARDATION

40 TAC §§4.101, 4.103, 4.105, 4.107, 4.109, 4.111, 4.113, 4.115, 4.117, 4.119, 4.121

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §4.101, concerning purpose; §4.103, concerning application; §4.105, concerning definitions; §4.107, concerning rights of an individual; §4.109, concerning rights of an individual receiving services and supports and a legally authorized representative (LAR); §4.111, concerning penalties for a violation of rights of an individual; §4.113, concerning rights protection officer at a state mental retardation facility (state MR facility) or mental retardation authority (MRA); §4.115, concerning Consumer Rights and Services; §4.117, concerning rights handbooks; §4.119, concerning communication of rights to an individual receiving services and supports and to an LAR; and §4.121, concerning staff training in rights, in Chapter 4, Rights and Protection of Individuals Receiving Mental Retardation Services, Subchapter C, Rights of Individuals with Mental Retardation.

Background and Purpose

The purpose of the new subchapter is to clarify the requirements for a state MR facility and an MRA regarding their responsibilities to inform individuals with mental retardation of their individual rights and educate their staff of these requirements. The requirements also direct the state MR facility and MRA to employ a rights protection officer dedicated to protect these rights. The new subchapter will also update the agency names from the consolidation of several state agencies, including part of the Texas Department of Mental Health and Mental Retardation, to create DADS.

Section-by-Section Summary

New §4.101 establishes the purpose of the subchapter, which includes the procedures for DADS informing an individual and LAR of the individual's rights if the individual resides in a state MR facility or receives services and supports from an MRA.

New §4.103 states that the subchapter applies to a state MR facility and an MRA.

New §4.105 defines the terms that are used in this subchapter.

New §4.107 includes specific rights of an individual as covered by the Persons with Mental Retardation Act (PMRA), but are not exclusive and do not limit the individual's rights otherwised guaranteed by the constitutions and laws of the United States and Texas.

New §4.109 describes the rights of an individual who is receiving services and supports and an LAR, who acts on behalf of the individual. It also includes additional rights for an individual residing in a state MR facility.

New §4.111 states that the penalties for violation of the rights of an individual are described in the PMRA, in Chapter 591, Subchapter C of the Texas Health and Safety Code.

New §4.113 requires a state MR facility and an MRA to employ a rights protection officer who advocates for the rights of an individual and assists the LAR in advocating for the rights of the individual. The new section requires the superintendent of a state MR facility and the chief executive officer of an MRA to specify the duties of the rights protection officer and ensure the duties do not include supervision or delivery of services and supports that would be a conflict of interest in advocating for the individual. The rights protection officer's contact information must be conspicuously posted and accessible to the individual.

New §4.115 requires a state MR facility and an MRA to post DADS' Consumer Rights and Services toll-free number in a conspicuous place. The new section describes the assistance a consumer rights representative in DADS Consumer Rights and Services will give an individual or an LAR upon request if an individual is denied services by DADS or an MRA.

New §4.117 requires a state MR facility and an MRA to provide a copy of the appropriate rights handbook to an individual and LAR or actively involved person. The rights handbook must be conspicuously displayed and include the contact information for the rights protection officer.

New §4.119 requires a state MR facility and an MRA to explain the rights as described in the rights handbook to the individual and LAR or actively involved person. The state MR facility and MRA must effectively communicate the rights of the individual to meet the individual's ability to comprehend. If the individual is unable to comprehend, an explanation provided to the LAR or actively involved person meets the requirement of this section. The state MR facility and MRA must document the explanation of rights with the appropriate signatures and maintain the documentation in the individual's record.

New §4.121 requires a state MR facility and an MRA to ensure staff members receive instruction on the requirements of this subchapter.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses or on businesses of any size as a result of enforcing or administering the new sections, because the sections clarify the procedures for the rights of an individual with mental retardation without adding requirements that will have an adverse economic effect on a state MR facility or MRA.

Public Benefit and Costs

Lawrence M. Parker, DADS Chief Operating Officer, has determined that, for each year of the first five years the new sections are in effect, the public benefit expected as a result of enforcing the new sections is that the individuals in a state MR facility or receiving services and supports from an MRA will be properly informed of their rights and that there will be staff dedicated to protect these rights.

Mr. Parker anticipates that there will not be an economic cost to persons who are required to comply with the new sections. The new sections will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Pam Carley at (512) 438-4694 in DADS Consumer Rights and Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-5010, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §592.002, which gave the Texas Department of Mental Health and Mental Retardation the power and duty to ensure, by rule, the implementation of the rights guaranteed in Chapter 592, Rights of Persons with Mental Retardation; and House Bill 2292 of the 78th Texas Legislature, Regular Session, Section 1.20(a)(3), which transferred that power and duty to DADS.

The new sections implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §592.002.

§4.101. Purpose.

This subchapter describes:

(1) the rights of an individual with mental retardation and of an LAR; and

(2) procedures of DADS for informing and protecting the rights of:

(A) an individual residing in a state MR facility or receiving services and supports from an MRA; and

(B) an LAR.

§4.103. Application.

This subchapter applies to:

(1) a state MR facility; and

(2) an MRA.

§4.105. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Actively involved person--A person with significant and ongoing involvement with an individual who lacks the ability to provide legally adequate consent and who does not have an LAR. The MRA providing services and supports to the individual or the state MR facility in which the individual resides determines if the person is actively involved based on the person's:

(A) observed interactions with the individual;

(B) knowledge of and sensitivity to the individual's preferences, values, and beliefs;

(C) availability to the individual for assistance or support; and

(D) advocacy for the individual's preferences, values, and beliefs.

(2) DADS--The Department of Aging and Disability Services.

(3) Individual--A person who has mental retardation.

(4) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, which may be a parent, guardian, or managing conservator of a minor individual, or the guardian of an adult individual.

(5) Local service area--A geographic area composed of one or more Texas counties that determines the MRA from which an individual may receive services.

(6) Mental retardation--Consistent with THSC, §591.003, significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(7) MRA (mental retardation authority)--An entity to which the Texas Health and Human Services Commission's authority and responsibility described in THSC, §531.002(11) has been delegated.

(8) PMRA (Persons with Mental Retardation Act)--Texas statutes relating to persons with mental retardation codified in THSC, Chapters 591 - 597.

(9) Services and supports--Assistance to an individual through an MRA or a state MR facility, which may include:

(A) eligibility determination;

(B) service coordination;

(C) support services;

(D) day services; and

(E) residential assistance.

(10) State MR facility (state mental retardation facility)--A state school or a state center operated by DADS.

(11) Subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(12) THSC (Texas Health and Safety Code)--A codification of Texas statutes relating to health and safety.

§4.107. Rights of an Individual.

The PMRA provides that an individual in Texas has the rights, benefits, and privileges guaranteed by the constitutions and laws of the United States and Texas, unless those rights, benefits, and privileges are lawfully restricted. The following specific rights listed in the PMRA are not exclusive and do not limit the rights otherwise guaranteed by the constitutions and laws of the United States and Texas:

(1) the right to protection from exploitation and abuse, as described in THSC, §592.012;

(2) the right to live in the least restrictive setting appropriate to the individual's needs and abilities and in a variety of living situations, as described in THSC, §592.013;

(3) the right to receive publicly supported educational services, as described in THSC, §592.014;

(4) the right to equal opportunities in employment, as described in THSC, §592.015;

(5) the right to purchase, rent, or lease real property, as described in THSC, §592.016;

(6) the right to adequate treatment and habilitative services, as described in THSC, §592.017;

(7) the right to promptly receive a determination of mental retardation using diagnostic techniques that are adapted to that individual's cultural background, language, and ethnic origin to determine if the individual is in need of mental retardation services, as described in THSC, §592.018;

(8) the right to request and promptly receive an administrative hearing to contest the findings of the determination of mental retardation, as described in THSC, §592.019;

(9) the right to an additional, independent determination of mental retardation performed at the individual's expense if the individual questions the validity or results of the determination of mental retardation, as described in THSC, §592.020; and

(10) the right to the presumption of competency, due process in guardianship proceedings, and fair compensation for the individual's labor for the economic benefit of another, regardless of any direct or incidental therapeutic value to the individual, as described in THSC, §592.021.

§4.109. Rights of an Individual Receiving Services and Supports and an LAR.

(a) An LAR has the authority to make certain decisions on an individual's behalf.

(b) An individual receiving services and supports and an LAR have the following rights:

(1) the right to participate in the development and periodic review of an individualized treatment plan and to receive the individual's progress in writing at reasonable intervals, as described in THSC, §§592.033 - 592.035;

(2) the right to choose from several appropriate services, if possible, as described in THSC, §592.035(b);

(3) the right to withdraw the individual from services and supports, as described in THSC, §592.036;

(4) the right to not receive unnecessary or excessive medications, as described in THSC, §592.038;

(5) the right to initiate a complaint on behalf of the individual, as described in THSC, §592.039;

(6) the right to be given written notice of the rights guaranteed by the PMRA in plain and simple language when the individual begins to receive services and supports, as described in THSC, §592.040;

(7) the right to have access to information contained in the individual's record, as described in THSC, §595.004; and

(8) the right to request an administrative hearing to contest a proposed transfer or discharge of the individual from a state MR facility, the denial of a requested discharge or transfer of the individual from a state MR facility, or the results of a determination of retardation

of the individual, as described in Subchapter D of this chapter (relating to Administrative Hearings Under the PMRA).

(c) An individual residing in a state MR facility has the following additional rights, as described in THSC, §592.051 and §592.052:

(1) the right to a normal residential environment;

(2) the right to a humane physical environment;

(3) the right to communication and visits;

(4) the right to possess personal property; and

(5) the right to prompt, adequate, and necessary medical and dental care and treatment for physical and mental ailments and to prevent an illness or disability.

§4.111. Penalties for a Violation of Rights of an Individual.

THSC, Chapter 591, Subchapter C, Penalties and Remedies, describes the penalties and remedies available for a violation of the rights of an individual guaranteed by the PMRA.

§4.113. Rights Protection Officer at a State MR Facility or MRA.

(a) A state MR facility and an MRA must employ a rights protection officer whose primary duty is to advocate for the rights of individuals served by that state MR facility or MRA and to assist LARs in advocating for the rights of individuals.

(b) The superintendent of a state MR facility and the chief executive officer of an MRA must specify the duties of the rights protection officer, which must include:

(1) receiving a complaint regarding the violation of an individual's rights or the quality of services and supports;

(2) investigating a complaint or forwarding the complaint to the appropriate investigatory entity;

(3) advocating for the resolution of a complaint;

(4) reporting the results of an investigation to the complainant, consistent with confidentiality rights;

(5) reviewing policies, procedures, and practices of the state MR facility or MRA that affect the rights of an individual to ensure that the individual's rights are protected;

(6) acting as the liaison between the state MR facility or MRA and the Department of Family and Protective Services regarding allegations of abuse or neglect; and

(7) acting as the liaison between the state MR facility or MRA and advocacy organizations.

(c) The superintendent of a state MR facility and the chief executive officer of an MRA must ensure that the duties of the rights protection officer do not include any supervision of or responsibility for the delivery of services and supports that would represent a conflict of interest with the rights protection officer's primary duty of advocacy on an individual's behalf.

(d) A state MR facility and an MRA must ensure that in every program and residential area of the state MR facility and MRA:

(1) the name, telephone number, e-mail address, and mailing address of the rights protection officer are posted conspicuously; and

(2) a telephone is accessible for an individual to contact the rights protection officer.

§4.115. Consumer Rights and Services.

(a) A state MR facility and an MRA must post DADS' Consumer Rights and Services toll-free number (1-800-458-9858) conspicuously in every program and residential area of the state MR facility or the MRA.

(b) A consumer rights representative in DADS Consumer Rights and Services assists an individual or an LAR upon request if DADS or an MRA denies services to the individual, including admission to a state MR facility.

(c) The consumer rights representative:

(1) explains and provides information about services and supports and the rules, procedures, and guidelines applicable to the individual who has been denied services; and

(2) assists the individual and the LAR in gaining access to appropriate services and supports or in placing the individual's name on an appropriate interest list.

§4.117. Rights Handbooks.

(a) DADS publishes handbooks describing the rights of an individual in simple, non-technical language and makes these handbooks available in English and in Spanish.

(b) A state MR facility must give a copy of *Your Rights in a State School or Center* to an individual and LAR or actively involved person when the state MR facility admits the individual and annually thereafter.

(c) An MRA must give a copy of *Your Rights in Mental Retardation Community Programs* to an individual and LAR or actively involved person when the individual applies to the MRA for services and supports and annually thereafter.

(d) DADS provides copies of *Your Rights in Mental Retardation Community Programs* to an MRA upon request in any language used by a significant percentage of the population in the MRA's local service area.

(e) A state MR facility and an MRA must conspicuously and at all times display the appropriate rights handbook in areas frequented by an individual, an individual's family member, or an LAR. The state MR facility and MRA must write in the handbook the name, telephone number, e-mail address, and mailing address of the rights protection officer at that state MR facility or MRA.

(f) A state MR facility and an MRA must provide the appropriate rights handbook to a person who requests a copy.

(g) The rights handbooks specified in subsections (b) and (c) of this section may be obtained:

(1) through DADS' website at http://www.dads.state.tx.us/news_info/publications/brochures/index.html#consumer;

(2) by writing the Department of Aging and Disability Services, Consumer Rights and Services, P.O. Box 149030, Mail Code E-249, Austin, Texas 78714-9030; or

(3) by calling the toll-free number at 1-800-458-9858.

(h) The following rights handbooks may be obtained by accessing the website or by writing or calling, as described in subsection (g)(1) - (3) of this section:

(1) *Your Rights in the Home and Community-based Services (HCS) Program*;

(2) *Your Rights in the Texas Home Living Program*; and

(3) *Your Rights in an ICF-MR Facility*.

(i) A state MR facility and an MRA may photocopy a rights handbook.

§4.119. Communication of Rights to an Individual Receiving Services and Supports and to an LAR.

(a) When a state MR facility or MRA gives a copy of the rights handbook in accordance with §4.117 of this subchapter (relating to Rights Handbooks), the state MR facility or MRA must explain the rights described in the rights handbook to the individual and LAR or actively involved person in plain and simple language and in a manner that the individual and LAR or actively involved person can easily understand. The explanation must address:

(1) circumstances under which the individual's rights may be limited;

(2) procedures that must be followed by the state MR facility or MRA to limit the individual's rights; and

(3) how and with whom a complaint about a violation of a right may be filed.

(b) The language and manner used to provide the explanation must be designed for effective communication, tailored to meet the individual's ability to comprehend, and be responsive to any visual or hearing impairment.

(c) If the individual is unable to comprehend the explanation of rights described in subsection (a) of this section, the explanation provided to the LAR or actively involved person meets the requirements of this section.

(d) The state MR facility or MRA must document that the explanation of rights occurred. The documentation must state the name of the individual and the date that the explanation of rights occurred, and must include the dated signatures of the individual, LAR or actively involved person, and the staff member who explained the rights to the individual. The state MR facility or MRA must maintain the documentation in the individual's record.

§4.121. Staff Training in Rights.

A state MR facility and an MRA must ensure that:

(1) an employee of the state MR facility or MRA who will provide direct services and supports to an individual or will routinely perform job duties in proximity to an individual, and the supervisor of such an employee, receive instruction on the contents of this subchapter before starting job duties and annually thereafter; and

(2) an employee of the state MR facility or MRA who will not provide direct services and supports to an individual and will not routinely perform job duties in proximity to an individual, and the supervisor of such an employee, receive instruction on the contents of this subchapter within two months after starting job duties and every two years thereafter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604797
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 438-3734

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CHAPTER 8. CLIENT CARE--MENTAL RETARDATION SERVICES
SUBCHAPTER Y. RIGHTS OF MENTALLY RETARDED PERSONS

40 TAC §§8.621 - 8.629

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter Y, consisting of §§8.621 - 8.629, concerning rights of clients receiving mental retardation services, in Chapter 8, Client Care--Mental Retardation Services.

Background and Purpose

The purpose of the repeal is to remove the rules from Chapter 8 so they can be updated and replaced with new rules in Chapter 4, Rights and Protection of Individuals Receiving Mental Retardation Services, new Subchapter C, Rights of Individuals with Mental Retardation. The new rules are proposed elsewhere in this issue of the *Texas Register*.

Section-by-Section Summary

The repeal of §§8.621 - 8.629 is proposed to delete rules governing the rights of individuals with mental retardation that have become outdated. The terminology and practices concerning these rights will be updated in Chapter 4, Subchapter C.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that the proposed repeal will have no adverse economic effect on small businesses or micro-businesses, or on businesses of any size, because the sections are not being removed from DADS' rule base; they are simply being relocated and rewritten in a new chapter.

Public Benefit and Costs

Lawrence M. Parker, DADS Chief Operating Officer, has determined that, for each year of the first five years after the repeal, the public benefit expected as a result of repealing the sections is that the rules concerning the rights of individual with mental retardation will be up-to-date, as well as more clearly written and easily understood.

Mr. Parker anticipates that there will not be an economic cost to persons who are affected by the repeal. The repeal will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Pam Carley at (512) 438-4694 in DADS Consumer Rights and Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-5010, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §592.002, which gave the Texas Department of Mental Health and Mental Retardation the power and duty to ensure, by rule, the implementation of the rights guaranteed in Chapter 592, Rights of Persons with Mental Retardation; and House Bill 2292 of the 78th Texas Legislature, Regular Session, Section 1.20(a)(3), which transferred that power and duty to DADS.

The repeal implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §592.002.

§8.621. Purpose.
§8.622. Application.
§8.623. Definitions.
§8.624. Rights of All Clients Receiving Mental Retardation Services.
§8.625. Rights of Clients Receiving Residential Mental Retardation Services.
§8.626. Rights Handbook for Clients Receiving Mental Retardation Services.
§8.627. Communication of Rights to Clients Receiving Mental Retardation Services.
§8.628. References.
§8.629. Distribution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604798
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §97.2, concerning definitions; §97.11, concerning criteria and eligibility for licensing; §97.19, concerning issuance of a renewal license; §97.241, concerning management; and §97.283, concerning advance directives; and new §97.223, concerning offenses barring agency licensure, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

Background and Purpose

The purpose of the amendments to §§97.2, 97.11, 97.19, and 97.241, and new §97.223 is to clarify DADS' authority to consider mitigating circumstances in determining whether a conviction will be a bar to a home and community support services agency (agency) licensure or participation in agency management. The amendments will eliminate some of the offenses that are bars to agency licensure in current rule language.

The purpose of the amendment to §97.283 is to restore text to subsection (a) that was inadvertently deleted during the recent adoption of an amendment to the section.

Section-by-Section Summary

The amendment to §97.2 adds a definition for "advisory committee" to help clarify the term as used in §97.242, concerning organizational structure and lines of authority. The amendment also adds a definition for "conviction" to clarify what constitutes a conviction for purposes of this chapter and corrects a cross-reference in the definition for "supervising nurse."

The amendment to §97.11 updates the rule to include criteria that DADS may use for denying an initial agency license. The amendment also removes the list of relevant crimes from §97.11 and adds a reference to new §97.223, which specifically defines the convictions.

The amendment to §97.19 updates the rule to include circumstances that DADS may use for denying the renewal of an agency license.

New §97.223 adds a list of misdemeanor or felony convictions that may constitute a bar to agency licensure or participation in agency management. The new section also includes the criteria that DADS will consider for determining a bar to agency licensure or participation in agency management.

The amendment to §97.241 removes the list of relevant crimes and adds a reference to new §97.223, which specifically defines the convictions.

The amendment to §97.283 adds specific provisions that an agency must follow in accordance with the Advance Directives Act, Health and Safety Code, Chapter 166.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses or on businesses of

any size as a result of enforcing or administering the amendments and new section, because the rules are being updated to reflect a more narrowly and specifically defined list of criminal convictions that can result in denial of agency licensure or participation in agency management. The proposal does not add new requirements that will have an adverse economic effect on an agency.

Public Benefit and Costs

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is that the rules will have a list of convictions that are potential bars to agency licensure or participation in agency management that relate more directly to owning and operating an agency or being an administrator of an agency. The public will benefit from the amendment to §97.283 by having the provisions from Health and Safety Code §166.004 that an agency must follow set out in the Texas Administrative Code.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Rosalind Nelson-Gamblin at (512) 438-3158 in DADS' Regulatory Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-058, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (5) (No change.)

(6) Advisory committee--A committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup, established for the purpose of obtaining advice or recommendations on issues or policies that are within the scope of a person's responsibility.

(7) [~~(6)~~] Affiliate--With respect to an applicant or license holder, which is:

(A) a corporation--means each officer, director, and stockholder with direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--means each officer, member, and parent company;

(C) an individual--means:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership or disclosable interest of at least 5.0%.

(D) a partnership--means each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--means each officer, director, or the equivalent under the specific business arrangement and each parent company.

(8) [~~(7)~~] Agency--A home and community support services agency.

(9) [~~(8)~~] Alternate delivery site--A facility or site, including a residential unit or an inpatient unit:

(A) that is owned or operated by an agency providing hospice services;

(B) that is not the hospice's principal place of business. For the purposes of this definition, the hospice's principal place of business is the parent office for the hospice;

(C) that is located in the geographical area served by the hospice; and

(D) from which the hospice provides hospice services.

(10) [~~(9)~~] Applicant--The owner of an agency that is applying for a license under the statute. This is the person in whose name the license will be issued.

(11) [~~(10)~~] Assistance with self-administration of medication--Any needed ancillary aid provided to a client in the client's self-administered medication or treatment regimen, such as reminding a client to take a medication at the prescribed time, opening and closing a medication container, pouring a predetermined quantity of liquid to be ingested, returning a medication to the proper storage area, and assisting in reordering medications from a pharmacy. Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation.

(12) [~~(11)~~] Association--A partnership, limited liability company, or other business entity that is not a corporation.

(13) [~~(12)~~] Audiologist--A person who is currently licensed under the Occupations Code, Chapter 401, as an audiologist.

(14) [~~(13)~~] Bereavement--The process by which a survivor of a deceased person mourns and experiences grief.

(15) [~~(14)~~] Bereavement services--Support services offered to a family during bereavement. Family includes a significant other(s).

(16) [~~(15)~~] Branch office--A facility or site in the service area of a parent agency from which home health or personal assistance services are delivered or where active client records are maintained. This does not include inactive records that are stored at an unlicensed site.

(17) [~~(16)~~] Care plan--

(A) a written plan prepared by the appropriate health care professional for a client of the home and community support services agency; or

(B) for home dialysis designation, a written plan developed by the physician, registered nurse, dietitian, and qualified social worker to personalize the care for the client and enable long- and short-term goals to be met.

(18) [~~(17)~~] Case conference--A conference among personnel furnishing services to the client to ensure that their efforts are coordinated effectively and support the objectives outlined in the plan of care or care plan.

(19) [~~(18)~~] Certified agency--A home and community support services agency, or portion of the agency, that:

(A) provides a home health service; and

(B) is certified by an official of the Department of Health and Human Services as in compliance with conditions of participation in Social Security Act, Title XVIII (42 United States Code (USC) §1395 et seq.).

(20) [~~(19)~~] Certified home health services--Home health services that are provided by a certified agency.

(21) [~~(20)~~] CHAP--Community Health Accreditation Program, Inc. An independent, nonprofit accrediting body that publicly certifies that an organization has voluntarily met certain standards for home and community-based health care.

(22) [~~(21)~~] Client--An individual receiving home health, hospice, or personal assistance services from a licensed home and community support services agency. This term includes each member of the primary client's family if the member is receiving ongoing services. This term does not include the spouse, significant other, or other family member living with the client who receives a one-time service (e.g., vaccine) if the spouse, significant other, or other family member receives the service in connection with the care of a client.

(23) [~~(22)~~] Clinical note--A dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms; treatment and medication given; the client's reaction; other health services provided; and any changes in physical and emotional condition.

(24) [~~(23)~~] CMS--Centers for Medicare and Medicaid Services. The federal agency that administers the Medicare program and works in partnership with the states to administer Medicaid.

(25) [~~(24)~~] Complaint--An allegation against an agency regulated by DADS or against an employee of an agency regulated by DADS that involves a violation of this chapter or the statute.

(26) [~~(25)~~] Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company or other business entity that operates or contracts with others for the operation of an agency;

(ii) a person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency; and

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(27) Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(28) [~~(26)~~] Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(29) [~~(27)~~] DADS--Department of Aging and Disability Services.

(30) [~~(28)~~] Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(31) [~~(29)~~] Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(32) [~~(30)~~] Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(33) [~~(31)~~] Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(34) [~~(32)~~] Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

(35) [~~(33)~~] End stage renal disease (ESRD)--For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(36) [~~(34)~~] Freestanding hospice--An agency that provides hospice services to clients of the agency who are residing at the agency's physical location including inpatient and respite care.

(37) [~~(35)~~] Functional need--Needs of the individual that require services without regard to diagnosis or label.

(38) [~~(36)~~] Health assessment--A determination of a client's physical and mental status through inventory of systems.

(39) [~~(37)~~] Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(40) [~~(38)~~] Home health aide--An individual working for an agency who meets at least one of the requirements for home health aides as defined in §97.701 of this chapter (relating to Home Health Aides).

(41) [~~(39)~~] Home health medication aide--A person permitted under the Health and Safety Code, Chapter 142, Subchapter B.

(42) [~~(40)~~] Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(43) [~~(41)~~] Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(44) [~~(42)~~] Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(45) [~~(43)~~] Independent living environment--A client's residence, which may include a group home or foster home, or other settings where a client participates in activities, including school, work, or church.

(46) [~~(44)~~] Individual/family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(47) [~~(45)~~] Individualized service plan--A written plan prepared by the appropriate health care personnel for a client of a home and community support services agency licensed to provide personal assistance services.

(48) [~~(46)~~] Inpatient unit--A facility that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with:

(A) the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.); and

(B) standards adopted under this chapter.

(49) [~~(47)~~] IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.

(50) [~~(48)~~] JCAHO--Joint Commission on Accreditation of Healthcare Organizations. An independent, nonprofit organization for standard-setting and accrediting in-home care and other areas of health care.

(51) [~~(49)~~] Licensed vocational nurse--A person who is currently licensed under Occupations Code, Chapter 301, as a licensed vocational nurse.

(52) [~~(50)~~] Manager--An employee or independent contractor responsible for providing management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(53) [~~(51)~~] Medication administration record--A record used to document the administration of a client's medications.

(54) [~~(52)~~] Medication list--A list that includes all prescription and over-the-counter medication that a client is currently taking, including the dosage, the frequency, and the method of administration.

(55) [~~(53)~~] Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(56) [~~(54)~~] Nursing facility--An institution licensed as a nursing home under the Health and Safety Code, Chapter 242.

(57) [~~(55)~~] Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help the client understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(58) [~~(56)~~] Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Occupations Code, Chapter 454, as an occupational therapist.

(59) [~~(57)~~] Original active client record--A record composed first-hand for a client currently receiving services.

(60) [~~(58)~~] Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness.

(61) [~~(59)~~] Parent agency--An agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(62) [~~(60)~~] Parent company--A person, other than an individual, who has a direct 100% ownership interest in the owner of an agency.

(63) [~~(61)~~] Person--An individual, corporation, or association.

(64) [~~(62)~~] Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Board of Nurse Examiners through a memorandum of understanding with DADS in accordance with Health and Safety Code, §142.016; and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(65) [~~(63)~~] Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

(A) bathing;

(B) dressing;

(C) grooming;

(D) feeding;

(E) exercising;

(F) toileting;

(G) positioning;

(H) assisting with self-administered medications;

(I) routine hair and skin care; and

(J) transfer or ambulation.

(66) [~~(64)~~] Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(67) [~~(65)~~] Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(68) [~~(66)~~] Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(69) [~~(67)~~] Physician-delegated task--A task performed in accordance with the Occupations Code, Chapter 157, including orders signed by a physician that specify the delegated task, the individual to whom the task is delegated, and the client's name.

(70) [~~(68)~~] Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. This term includes a parent agency, a branch office, and an alternate delivery site. The term does not include an administrative support site.

(71) [~~(69)~~] Plan of care--The written orders of a practitioner for a client who requires skilled services.

(72) [~~(70)~~] Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Board of Nurse Examiners for the State of Texas as an advanced practice nurse.

(73) [~~(71)~~] Presurvey conference--A conference held with DADS staff and the applicant or the applicant's representatives to review licensure standards and survey documents, and to provide consultation before the survey.

(74) [~~(72)~~] Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(75) [~~(73)~~] Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(76) [~~(74)~~] Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(77) [~~(75)~~] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC, Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(78) [~~(76)~~] Residence--A place where a person resides, including a home, a nursing facility, a convalescent home, or a residential unit.

(79) [~~(77)~~] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(80) [~~(78)~~] Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(81) [~~(79)~~] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(82) [~~(80)~~] Section--A reference to a specific rule in this chapter.

(83) [~~(81)~~] Service area--A geographic area established by an agency in which all or some of the agency's services are available.

(84) [~~(82)~~] Skilled services--Services in accordance with a plan of care that require the skills of:

(A) a registered nurse;

(B) a licensed vocational nurse;

(C) a physical therapist;

(D) an occupational therapist;

(E) a respiratory therapist;

(F) a speech-language pathologist;

(G) an audiologist;

(H) a social worker; or

(I) a dietitian.

(85) [~~(83)~~] Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(86) [~~(84)~~] Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(87) [~~(85)~~] Statute--The Health and Safety Code, Chapter 142.

(88) [~~(86)~~] Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(89) [~~(87)~~] Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(c) [~~§97.244(b)~~] of this chapter (relating to Administrator [~~Staffing~~] Qualifications and Conditions and Supervising Nurse Qualifications). This person may also be known as the director of nursing or similar title.

(90) [~~(88)~~] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(91) [~~(89)~~] Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(92) [~~(90)~~] Survey--An on-site inspection or complaint investigation conducted by a DADS representative to determine if an agency is in compliance with the statute and this chapter or in compliance with applicable federal requirements or both.

(93) [~~(91)~~] Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(94) [~~(92)~~] Unlicensed person--An individual who is not licensed as a health care professional. The term includes home health aides, medication aides permitted by DADS, and other individuals providing personal care or assistance in health services.

(95) [~~(93)~~] Unsatisfied judgments--A failure to fully carry out the terms or meet the obligation of a court's final disposition on the matters before it in a suit regarding the operation of an agency.

(96) [~~(94)~~] Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(97) [~~(95)~~] Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(98) [~~(96)~~] Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604789
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §97.11, §97.19

Statutory Authority

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.11. Criteria and Eligibility for Licensing.

(a) - (f) (No change.)

(g) DADS may deny the issuance of [~~does not issue~~] a license to an applicant if the applicant, a controlling person of the applicant,

a person with a disclosable interest, an affiliate of the applicant, an administrator, or an alternate administrator:

(1) at the time of application:

(A) has been convicted [~~a criminal history~~] of:

(i) a crime listed in Health and Safety Code, §250.006 (relating to Convictions Barring Employment) within the time frames described in that section; or

(ii) a crime listed in §97.223 of this chapter (relating to Offenses Barring Agency Licensure) within the time frames described in that section;

~~*[(ii)* a conviction relating to deceptive business practices;]~~

~~*[(iii)* a misdemeanor or felony of practicing any health-related profession without a required license;]~~

~~*[(iv)* a conviction under any federal or state law relating to drugs, dangerous drugs, or controlled substances;]~~

~~*[(v)* an offense under the Penal Code involving a client or client of a health care facility or agency; or]~~

~~*[(vi)* a misdemeanor or felony offense under the Penal Code, as follows:]~~

~~*[(I)* Title 5, concerning offenses against the person;]~~

~~*[(II)* Title 7, concerning offenses against the property;]~~

~~*[(III)* Title 9, concerning offenses against public order and decency;]~~

~~*[(IV)* Title 10, concerning offenses against public health, safety, and morals; or]~~

~~*[(V)* Title 4, concerning offenses of attempting or conspiring to attempt any of the offenses listed herein;]~~

(B) - (D) (No change.)

(2) for two years preceding the date of application, has a history in any state or other jurisdiction of any of the following:

(A) an unresolved [a] federal or state tax lien;

(B) an eviction involving any property or space used as an inpatient hospice agency; or

(C) (No change.)

(3) (No change.)

§97.19. Issuance of a Renewal License.

(a) - (c) (No change.)

(d) DADS may deny renewal of [~~does not renew~~] a license if:

(1) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES
DIVISION 2. CONDITIONS OF A LICENSE

40 TAC §97.223

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The new section implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.223 Offenses Barring Agency Licensure.

(a) Texas state convictions. This section contains the list of misdemeanor and felony convictions that may constitute a bar to agency licensure or participation in agency management under §§97.11, 97.19, and 97.241 of this chapter (relating to Criteria and Eligibility for Licensing; Issuance of a Renewal License; and Management).

(b) Federal or other state convictions. A criminal conviction under any federal or state law similar to the offenses listed in subsections (d) and (e) of this section is a potential bar to agency licensure or participation in agency management under §§97.11, 97.19, and 97.241 of this chapter.

(c) Determination of conviction applicability. In determining if a conviction is a bar to initial licensure, renewal of a license, or participation in agency management, DADS considers the following:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring a license to provide home and community support services;

(3) the extent to which a license or position in agency management might offer an opportunity to engage in further criminal activity of the same type in which the person previously had been involved;

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties of the position in an agency;

(5) the age of the person when the crime was committed; and

(6) the amount of time that has elapsed since the person's last criminal activity.

(d) Permanent conviction list. Regardless of the date of the conviction, the following may constitute a bar to agency licensure or participation in agency management:

(1) a conviction of practicing any health-related profession without a required license;

(2) a conviction relating to drugs, dangerous drugs, or controlled substances;

(3) a conviction involving a health care client; or

(4) a misdemeanor or felony conviction for one of the following offenses under the Texas Penal Code:

(A) Section 21.12, Improper relationship between educator and student;

(B) Section 21.15, Improper photography or visual recording;

(C) Section 22.015, Coercing, soliciting, or inducing gang membership;

(D) Section 22.021, Aggravated sexual assault;

(E) Section 22.05, Deadly conduct;

(F) Section 22.07, Terroristic threat;

(G) Section 22.09, Tampering with consumer product;

(H) Section 22.10, Leaving a child in a vehicle;

(I) Section 32.42, Deceptive business practices;

(J) Section 32.51, Fraudulent use or possession of identifying information;

(K) Section 33.021, Online solicitation of a minor;

(L) Section 34.02, Money laundering;

(M) Section 35.02, Insurance fraud;

(N) Section 35A.02, Medicaid fraud;

(O) Section 42.072, Stalking;

(P) Section 42.09, Cruelty to animals;

(Q) Section 42.10, Dog fighting;

(R) Section 43.05, Compelling prostitution;

(S) Section 43.24, Sale, distribution, or display of harmful material to minor;

(T) Section 43.25, Sexual performance by a child;

(U) Section 43.251, Employment harmful to children;

(V) Section 43.26, Possession or promotion of child pornography;

(W) Section 46.06, Unlawful transfer of certain weapons;

(X) Section 46.13, Making a firearm accessible to a child;

(Y) Section 48.02, Prohibition of the purchase and sale of human organs;

(Z) Section 49.07, Intoxication assault; or

(AA) Section 49.08, Intoxication manslaughter.

(e) Five-year conviction list. Convictions for the following misdemeanor or felony offenses under the Texas Penal Code may constitute a bar to agency licensure or participation in agency management if the final date of the conviction is within the last five years:

(1) Section 30.03, Burglary of coin-operated or coin collection machines;

(2) Section 30.04, Burglary of vehicles;

(3) Section 31.03, Theft;

(4) Section 31.04, Theft of service;

(5) Section 32.21, Forgery;

(6) Section 32.31, Credit card or debit card abuse;

(7) Section 32.33, Hindering secured creditors;

(8) Section 32.48, Simulating legal process;

(9) Section 33.02, Breach of computer security;

(10) Section 42.061, Silent or abusive calls to 9-1-1 service;

(11) Section 42.07, Harassment; or

(12) Section 42.091, Attack on assistance animal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 3. AGENCY ADMINISTRATION

40 TAC §97.241

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.241. Management.

(a) (No change.)

(b) Criminal conviction. The license holder, the controlling person, the affiliate, the administrator, or the alternate administrator must not have been [~~at no time during the licensure period be~~] convicted of:

(1) a crime listed in Health and Safety Code, §250.006 (relating to Convictions Barring Employment) during the time frames described in that section; or

(2) a crime listed in §97.223 of this chapter (relating to Offenses Barring Agency Licensure) during the time frames described in that section.

[~~(2) a crime relating to deceptive business practices;~~]

[~~(3) a misdemeanor of practicing any health-related profession without a required license;~~]

[~~(4) a crime under any federal or state law relating to drugs, dangerous drugs, or controlled substances;~~]

[~~(5) an offense under the Penal Code involving a client or client of a health care facility or agency; or~~]

[~~(6) a misdemeanor or felony offense under the Penal Code, as follows:~~]

[~~(A) Title 5, concerning offenses against the person;~~]

[~~(B) Title 7, concerning offenses against the property;~~]

[~~(C) Title 9, concerning offenses against public order and decency;~~]

[~~(D) Title 10, concerning offenses against public health, safety, and morals; or~~]

[~~(E) Title 4, concerning offenses of attempting or conspiring to attempt any of the offenses listed herein.~~]

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604792
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 438-3734

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §97.283

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.283. Advance Directives.

(a) An agency must maintain a written policy regarding implementation of advance directives. The policy must be in compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.

(1) The policy must include a clear and precise statement of any procedure the agency is unwilling or unable to provide or withhold in accordance with an advance directive.

(2) Except as provided by paragraph (4) of this subsection, the agency must provide written notice to an individual of the written policy required by this subsection. The notice must be provided at the earlier of:

(A) the time the individual is admitted to receive services from the agency; or

(B) the time the agency begins providing care to the individual.

(3) If, at the time notice is to be provided under paragraph (2) of this subsection, the individual is incompetent or otherwise incapacitated and unable to receive the notice required by this subsection, the agency must provide the required written notice, in the following order of preference, to:

(A) the individual's legal guardian;

(B) a person responsible for the health care decisions of the individual;

(C) the individual's spouse;

(D) the individual's adult child;

(E) the individual's parent; or

(F) the person admitting the individual.

(4) If paragraph (3) of this subsection applies, except as provided by paragraph (5) of this subsection, if an agency is unable, after a diligent search, to locate an individual listed by paragraph (3) of this subsection, the agency is not required to provide the notice.

(5) If an individual who was incompetent or otherwise incapacitated and unable to receive the notice required by this subsection at the time notice was to be provided under paragraph (2) of this subsection later becomes able to receive the notice, the agency must provide the written notice at the time the individual becomes able to receive the notice.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604793

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 8. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER C. LICENSES, GENERALLY

43 TAC §8.87

The Texas Department of Transportation (department) proposes new §8.87, Effect of Criminal Conduct of Applicants and Licensees on Licensure, relating to motor vehicle dealer, manufacturer, distributor, converter, lessor, lease facilitator, representative, and in-transit licenses issued under Occupations Code, Chapter 2301, Transportation Code, Chapter 503, and 43 TAC Chapter 8, Motor Vehicle Distribution.

EXPLANATION OF PROPOSED NEW SECTION

Occupations Code, Chapter 53, Consequences of Criminal Conviction, authorizes licensing authorities to use criminal conviction information in making licensing decisions. The statute requires the licensing authority to publish the guidelines used in implementing the statute. In addition, Occupations Code, §2301.651 authorizes the department to determine an individual's fitness to perform the duties required under the license. The department can deny an applicant or suspend or revoke a current licensee that the department determines is unfit to perform the duties or carry out the responsibilities of a licensee. The Texas Transportation Commission (commission) proposes this new rule to conform with the requirements outlined in Occupations Code, Chapter 53 and to provide guidelines for licensing decisions based on Occupations Code, §2301.651.

The business of buying, selling, and exchanging motor vehicles is of vital importance to the economy of the state of Texas and it is essential that the public have confidence in the oversight and regulation of the industry. The department considers it important that licensees and license applicants, including managers, owners, corporate officers, partners, and other persons acting in a representative capacity for an applicant or licensee, be honest, trustworthy, and reliable in their dealings with the public. In the course of business, licensees interact with the public in a very personal manner. Through motor vehicle sales and leases, the licensee obtains and handles sensitive personal and financial information. Due to the complexity of motor vehicle sales and financing, the public relies upon representations made by and information obtained from licensees. This reliance creates opportunities for profiting from fraudulent or deceptive practices in motor vehicle transactions. These acts can cause serious financial harm to individuals who may be victims of deceptive, fraudulent, and illegal acts by persons in the business of selling motor vehicles.

Proposed new language states that the department has determined that any felony is an offense of such a serious nature that a conviction of a felony offense is of prime importance in determining fitness for licensure under Occupations Code, §2301.651(a)(1). The department has concluded that an individual should not be licensed until three years have passed from the completion of the sentence, parole, or community supervision stemming from the conviction of any felony offense. The department believes this three-year standard is reasonable and within the authority of Occupations Code, §2301.651 to determine fitness for obtaining a license.

Under Occupations Code, Chapter 53 the department has determined that an individual convicted of any offense involving the distribution, sale, financing, or leasing of motor vehicles, odometer fraud, tax evasion, title fraud, or Vehicle Identification Number (VIN) plate tampering directly relates to the occupation of distributing motor vehicles. Issuing a license to such an individual would continue to provide the individual the opportunity to engage in further criminal activity of the same nature. The department will consider individuals convicted of these types of offenses on a case-by-case basis to determine the issuance or renewal of the license, according to the requirements of Occupations Code, Chapter 53.

Proposed new language provides the hearing process for an individual adversely affected by the new procedures. The applicant or licensee will be notified of the action and will have an opportunity to request an administrative hearing. The hearing will be conducted under the provisions of Occupations Code, §§2301.701 - 2301.713, 2301.806 and 43 TAC Chapter 8, Subchapter B.

Proposed language establishes a revocation for the failure of an applicant or licensee to notify the department of a conviction. Additional provisions set out that an applicant whose license or application has been revoked or denied may not reapply before the first anniversary of the revocation or denial. The proposed language also provides that the department will not refund fees paid by an applicant if the license is revoked or the application denied.

Proposed subsection (k) provides that applicants or licensees who disclosed the conviction prior to December 1, 2006 will not be affected by the proposed rule. Those individuals who have had their criminal conviction information reviewed under the procedures in place prior to the adoption of this rule will not be subject to denial of renewal or revocation of their license based on the provisions of the proposed subsections (c) and (d).

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new section as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the section as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Bray has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be a reduction in the number of convicted felons and certain other criminals in the vehicle distribution industry. The reputation and

sales practices of the industry may improve and the public's confidence in dealers and other licensees may rise. In addition, the section will simplify the application review process as it relates to criminal convictions. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on October 3, 2006, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed new section may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on October 9, 2006.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005 and §2301.155, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.651 and Transportation Code, §503.038.

§8.87. Effect of Criminal Conduct of Applicants and Licensees on Licensure.

(a) For purposes of this section the terms "applicant" and "licensee" include a sole proprietor, any officers or directors of corporations, partners and managing partners of partnerships, managers or members of limited liability companies, limited partners and general partners of limited partnerships, general managers, and dealer principals.

(b) In accordance with Occupations Code, §53.021(b), any license issued to a licensee shall be revoked upon the licensee's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision, in any jurisdiction.

(c) A licensee or applicant is deemed unfit under Occupations Code, §2301.651(a)(1) if the applicant or licensee has been convicted of a felony, or one of the offenses enumerated in subsection (d) of this section, in any jurisdiction, for which less than three years have elapsed since the completion of the sentence, parole, or community supervision. A new, renewal, or amendment application filed by such a licensee or applicant shall be denied.

(d) A new, renewal, or amendment application for a license may be denied or license revoked if the applicant or licensee has been convicted of any felony or misdemeanor in any jurisdiction relating to:

(1) the distribution, sale, financing, or leasing of motor vehicles;

(2) odometer fraud;

(3) tax evasion;

(4) title fraud; or

(5) Vehicle Identification Number (VIN) plate tampering.

(e) In determining whether to deny an application under subsection (d) of this section, the department shall consider the factors set out in Occupations Code, §53.022 and §53.023.

(f) Upon determination that a new, renewal, or amendment application should be denied or a license revoked, the department will mail a notice of the denial or revocation to the last known address of the applicant or licensee by certified mail, clearly stating:

(1) the reason for the denial or revocation;

(2) the effective date of the denial or revocation;

(3) the right of the applicant or licensee to request an administrative hearing on the question of denial or revocation; and

(4) if the applicant or licensee wants to protest the denial or revocation, a request for a hearing must be made in writing to the department within 20 days of receipt of notice of the denial or revocation.

(g) Hearings requested under subsection (f) of this section shall be conducted under the provisions of Occupations Code, §§2301.701 - 2301.713, 2301.806, and Subchapter B of this chapter.

(h) The failure of an applicant or licensee to report to the department a conviction of an offense, other than a Class C traffic violation, shall be cause for denying, revoking, or suspending the license under Occupations Code, §2301.651(a)(2).

(i) A licensee or applicant whose license or application is revoked or denied under this section may not apply for a new license before the first anniversary of the date of the revocation or denial.

(j) The department will not refund fees paid by an applicant if the license is revoked or denied under this subsection.

(k) Subsections (c) and (d) of this section do not apply to renewal or amendment applications if the licensee's conviction was disclosed to the Motor Vehicle Division prior to December 1, 2006.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604743
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER A. GENERAL

The Texas Department of Transportation (department) proposes the repeal of §9.2, contract claim procedure, and new §9.2, contract claim procedure and §9.6, contract claim procedure for comprehensive development agreement.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

The repeal of §9.2 and simultaneous adoption of new §9.2 implement Transportation Code, §201.112 concerning contract claims. The new section is organized so that the procedures for filing a contract claim are in chronological order. This is intended to make the rule easier to use.

The section also includes several new provisions. Section 9.2(c) concerns contract claims under a comprehensive development agreement (CDA). The new provision recognizes new §9.6 and that the CDA may provide the procedure for resolving a claim under the CDA. The explanation of new §9.6 later in this preamble describes the new procedure authorized for a contract claim under a CDA.

New §9.2(g)(2)(A) adds a provision concerning the deadline for filing a claim. The repealed rule required that a claim be filed no later than one year after the department issues acceptance of the project that is the subject of the contract. The new rule also specifies that a claim must be filed no later than one year after the department issues notice to the contractor that it is in default, or the department terminates the contract. The department believes the addition of this deadline is reasonable. A contractor will be able to determine whether it has a claim within one year after the contractor's work on the contract ends because of default or termination. A contractor's opportunity to file a claim should not be extended beyond one year simply because the contractor's surety or a different contractor continues to work under the contract.

Section 9.2(g)(2)(C) and (D) adds a requirement that a prime contractor certify the accuracy of a claim. The provisions are modeled after federal contract dispute procedure found at 41 USC §605(c) and 48 CFR §33.207. The purpose is to require the person submitting a claim on behalf of a prime contractor to review the claim and supporting documentation to ensure its accuracy and veracity.

Section 9.2(g)(3)(D)(i) and (iii) changes the procedure related to the contract claim committee's decision and the claimant's acceptance of the decision or failure to respond. The new rule does not require Texas Transportation Commission (commission) approval of the settled claim. The department eliminated this requirement because it is not required in Transportation Code, §201.112. However, the executive director may request the commission approve the settlement. The committee will continue to give notice to the commission and executive director of a settled claim.

Section 9.2(h) adds a provision that a claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department. The provision is modeled after federal law at 28 USC §2514. The purpose is to give the department an appropriate remedy in its own contract claim rule should a claimant present a fraudulent claim. The department does not intend this new subsection to limit other remedies or actions available in law.

Section 9.2(i) concerns the relation of a contract claim proceeding and sanction proceeding concerning the same contract. This new subsection supersedes §9.2(b)(3) in the repealed rule. The new section continues to provide that a contract claim must be considered by the committee before the claim is considered in a contested case. However, §9.2(i) also provides that the processing of a contract claim is a separate proceeding and shall not affect the executive director's assessment of a contract sanction under Subchapter G of this chapter (relating to Contractor Sanctions). If a contested issue arises (e.g. whether the department engineer properly defaulted the contractor) that is common to the two proceedings then the issue shall be resolved in the first proceeding referred for a contested case hearing. The department intends that if there are two simultaneous proceedings that they both proceed as expeditiously as possible. But if there is a contested issue that is litigated in a contested case hearing, the resolution of the issue should be binding on all subsequent department proceedings. In addition, if the contested issue relates to a question submitted to the department engineer under the contract, then the standard by which that decision will be reviewed is that it shall be upheld unless it was based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment. This is the standard by which a claim is judged pursuant to Texas Department of Transportation v. Jones Brothers Dirt and Paving Contractors, Inc., 92 S.W.3d 477 (Tex. 2002). The department believes the new rule will ensure that the same standard of review applies whether a contested issue is decided in a claim proceeding or sanction proceeding. This will make the review of engineer's decisions consistent, and not depend on which proceeding happened to be referred first for a contested case hearing. New §9.2(i) is also consistent with §9.102(d) of this chapter (relating to Procedure) concerning sanctions, which provides that the imposition of sanctions does not affect a contractor's contractual obligations or limit the commission's contractual remedies.

New §9.6 concerns contract claim procedure for a claim under a CDA. A CDA is an agreement with a private entity that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of an eligible project and may also provide for the financing, acquisition, maintenance, or operation of an eligible project. The authorization for the department entering into a CDA is Transportation Code, Chapter 223, Subchapter E. Subchapter E lists the eligible projects. Other provisions in Transportation Code, §91.054 (rail facilities), and §227.023 (Trans-Texas Corridor) also authorize the department to enter into a CDA.

New §9.6 is authorized by Transportation Code, §201.112(a), which specifies that the department may, by rule, establish procedures for the informal resolution of a claim arising out of a con-

tract for a highway project. Transportation Code, Chapter 223, Subchapter E, specifies the procedure by which the department may enter into a CDA and the department's authority to agree on specific matters. Under Transportation Code, §223.203(n) the department may prescribe the general form of a CDA and may include any matter the department considers advantageous to the department. Under Transportation Code, §223.208(b) the department may include any provision that the department considers appropriate.

The department's experience using CDAs shows the need for the new rule. The department has already entered into several CDAs. As the department has expanded the use of CDAs, the department has also expanded their scope. This experience indicates that the ability of developers under CDA's to effectively raise equity and debt financing for CDA projects depends on an administrative process for dispute resolution under which the decision maker is not a party to the CDA, and that produces finality of decision within a reasonable time.

The department believes it may be necessary that CDAs, and especially those that include the developer operating and financing the project, include a dispute resolution procedure other than as contemplated in §9.2. New §9.6 is intended to authorize the executive director to enter into a CDA with a negotiated dispute resolution procedure. The procedure must comply with Transportation Code, §201.112, and meet the requirements of §9.6. Section 9.6 includes specific requirements to ensure that a negotiated procedure complies with Transportation Code, §201.112, and to ensure that the general outline of the procedure is consistent for all CDAs.

Section 9.6(b) describes the applicability of the section to a CDA. Under a specific CDA, all disputes shall be under the dispute procedure in §9.2, or all shall be under §9.6, as specified in the CDA. No CDA shall have some disputes resolved under §9.2 and some under §9.6. If the CDA is silent on the matter then all disputes shall be resolved under §9.2. The purpose is to have one procedure apply to all disputes under a CDA so the parties are sure of the applicable procedure.

Section 9.6(b) also specifies the matters that are, and are not, controlled by a disputes board procedure. A disputes board procedure can be applied to other agreements related to a CDA provided they are specifically identified as being subject to the disputes board procedure. A disputes board procedure does not apply to the listed equitable matters over which courts have jurisdiction, and to other matters identified in a CDA.

Section 9.6(d) specifies the mandatory provisions in a disputes board procedure. There shall be a disputes board that shall consider disputes and issue decisions. Before a dispute is referred to a disputes board, a CDA shall require that a claim be referred for informal dispute resolution, optional mediation, or other alternative dispute resolution process. The party making a claim shall file a certified claim.

Section 9.6(e) specifies that if a CDA includes a claim procedure authorized by the section, the claim procedure may include certain permissive provisions. The subsection authorizes, but does not require, the provisions because the parties may negotiate a different procedure that is acceptable and consistent with Transportation Code, §201.112. When the parties negotiate a CDA they may agree to use the permissive provisions, or agree not to use them. They may even agree to terms that are contrary to the permissive terms so long as the claim procedure complies with the remainder of the section.

The permissive provisions include: a decision of the disputes board is final, conclusive, binding upon, and enforceable against the parties. However, a disputes board decision is subject to review to determine if there was a disputes board error. Whether there was disputes board error may be referred for a contested case hearing. If there was a disputes board error then the dispute shall be remanded back to a disputes board. A disputes board is authorized to direct that an award be paid from the proceeds of any trust or other pool of project funds that the CDA provides shall be available for payment of such claims. During the processing of a claim, the developer and its subcontractors shall continue work under the CDA, subject to certain specified exceptions.

The department believes subsections (d) and (e) are authorized under Transportation Code, §201.112(a). The law authorizes the department by rule to establish procedures for informal resolution of a claim. New §9.6 labels the disputes board as a "formal" dispute resolution procedure. But the department uses this label only to distinguish the required "informal dispute resolution," the optional mediation, and mandatory "formal dispute resolution" required under §9.6(d)(2). The disputes board is "formal" in the sense that it conducts proceedings on a claim, and makes a decision that is binding on the parties, absent disputes board error. But the disputes board is informal in the sense that the parties can change the disputes board procedure if they agree. Also, a disputes board exists only as authorized in the CDA. It is not permanent and it is not a governmental entity. The department believes Transportation Code, §223.203(n) and §223.208(b) authorize the creation of a disputes board procedure.

Section 9.6(f), Pass-through claims, specifies that a dispute procedure may provide that a developer who is a party to a comprehensive development agreement with the department may make a claim on behalf of a subcontractor. However, the developer must be liable to the subcontractor on the claim.

Section 9.6(g) sets additional mandatory requirements that apply specifically to proceedings of a disputes board. The requirements limit the authority of a disputes board, and set conflict of interest parameters.

Section 9.6(i) sets additional permissive requirements that apply specifically to proceedings of a disputes board.

Section 9.6(j) sets permissive requirements in the CDA concerning a contested case hearing held under Transportation Code, §201.112. The scope of a contested case hearing on a dispute is limited solely to whether a disputes board error occurred upon the disputes board processing the dispute. The executive director's order remanding a dispute to a disputes board, or the executive director's order implementing a disputes board decision following a contested case hearing, are subject to judicial review under Government Code, Chapter 2001, under the substantial evidence rule. Review is limited to whether disputes board error occurred.

Section 9.6(k) specifies that a disputes board agreement may provide that the procedural rules for a contested case may adopt, modify, or not follow the procedural rules in department rules.

Section 9.6(l) clarifies that the section does not interfere with a developer's rights to seek mandamus relief pursuant to Government Code, §22.002(c).

Section 9.6(m) concerns whether information exchanged among the parties during the dispute resolution procedure is confidential.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there could be fiscal implications for state government as a result of enforcing or administering the proposal. However, the fiscal impact cannot be quantified because such impact would be a function of the number of claims that need to be heard by a disputes board, if any, and the length of time such hearings might last. There is no history upon which to base such an estimate.

New §9.2 is mostly a reorganized version of the repealed §9.2. The provisions in new §9.2 that are not in the repealed §9.2 will not have fiscal implications. The new provision concerning a simultaneous contract claim proceeding and sanction proceeding may allow for more efficient litigation of disputes, but the potential costs savings for the department are too unpredictable to measure.

New §9.6 could have fiscal implications. The rule allows, but does not require, the use of a disputes board for resolution of a contract claim under a CDA. It is difficult to measure the fiscal implications for the state because the department will decide on a case by case basis whether to include a disputes board procedure in a CDA. If the department agrees to use new §9.6, it is not clear how many disputes will arise under the CDA. Also, assuming a claim arises under a CDA, there would be costs incurred by the department to process the matter, whether processed under §9.2 or §9.6. If the department agrees to use a disputes board, the department may incur half the fees and costs of the disputes board, which could be significant. But this also means the department would use less staff resources, namely the efforts of department staff appointed to the contract claim committee. And under §9.6 the department's costs to participate in a contested case hearing also should be much lower. The scope of the contested case hearing is limited to whether the disputes board decision was affected by disputes board error. The department anticipates being represented in contract claim matters by the Office of the Attorney General, whether the proceeding is under §9.2 or §9.6, and so those costs should be the same.

There will be no loss or gain in revenue to the state. Assuming a party makes a valid claim and is awarded a payment on the claim, the payment should be attributed to the substantive agreement in the CDA. The claim procedure itself, whether under §9.2 or §9.6, is not the basis for the loss or gain of revenue.

Sections 9.2 and 9.6 would have no effect on local governments. Only the department may enter into a CDA with a private developer.

Bob Jackson, Interim General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal and new sections. There will be no adverse economic effect on small businesses.

PUBLIC BENEFIT

Mr. Jackson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeal and new sections is as follows. New §9.2 will make it easier for the public to understand the department's contract claim procedure. The benefits for contractors are the same as the benefits for the department described above. The new rule may allow for more efficient litigation of disputes. There will be some additional costs incurred by contractors to satisfy the new requirement that a contract claim shall be certified. The department believes the added costs will be justified by the public benefit to ensure the accuracy and veracity of claims made.

New §9.6 will benefit the public because it will facilitate the department's use of a CDA to construct transportation facilities. The department may wish to construct a facility for which current federal or state funding does not exist or is inadequate. In those instances the department may seek to enter into a CDA with a developer, for example, designing, building, and financing the facility. The new rule will give the department more options to negotiate the CDA. There will be no cost impact on developers. The rule applies only if the developer agrees to the use of a disputes board. If a contract dispute arises, the developer would incur costs to participate in the proceeding whether it is under §9.2 or §9.6.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on October 4, 2006, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal and new sections may be submitted to Bob Jackson, Interim General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 9, 2006.

43 TAC §9.2

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, under Government Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section. New §9.6 is also authorized by Transportation Code, §223.203, which provides the department may prescribe the general form of a CDA and may include any matter the department considers advantageous to the department, and Transportation Code, §223.208, which provides the department may include in a CDA any provision that the department considers appropriate.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.112, 223.203, and 223.208.

§9.2. Contract Claim Procedure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604744
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-8683

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43 TAC §9.2, §9.6

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, under Government Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section. New §9.6 is also authorized by Transportation Code, §223.203, which provides the department may prescribe the general form of a CDA and may include any matter the department considers advantageous to the department, and Transportation Code, §223.208, which provides the department may include in a CDA any provision that the department considers appropriate.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.112, 223.203, and 223.208.

§9.2. Contract Claim Procedure.

(a) Applicability. A claim shall satisfy the requirements in paragraphs (1) - (3) of this subsection.

(1) The claim is under a contract entered into and administered by the department, acting in its own capacity or as an agent of a local government, under one of the following statutes:

(A) Transportation Code, §22.018 (concerning the designation of the department as agent in contracting and supervising for aviation projects);

(B) Transportation Code, §391.091 (concerning erection and maintenance of specific information logo, major area shopping guide, and major agricultural interest signs);

(C) Transportation Code, Chapter 223 (concerning bids and contracts for highway improvement projects), subject to the provisions of subsection (c) of this section; or

(D) Government Code, Chapter 2254, Subchapters A and B (concerning professional or consulting services).

(2) The claim is for compensation, or for a time extension, or any other remedy.

(3) The claim is brought by a prime contractor or by the department.

(b) Pass-through claim. A prime contractor may make a claim on behalf of a subcontractor only if the prime contractor is liable to the subcontractor on the claim.

(c) Claim concerning comprehensive development agreement. A claim under a comprehensive development agreement (CDA) entered into under Transportation Code, Chapter 223, Subchapter E, may be processed under this section if the parties agree to do so in the CDA, or if the CDA does not specify otherwise. However, if the CDA specifies that a claim procedure authorized by §9.6 of this chapter (relating to Contract Claim Procedure for Comprehensive Development Agreement) applies, then any claim arising under the CDA shall be processed and resolved in accordance with the claim procedure authorized by §9.6 of this chapter and not by this section.

(d) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise, except that when used in subsection (c) of this section, the terms claim, comprehensive development agreement and CDA shall have the meanings given such terms stated in §9.6 of this chapter.

(1) Claim--A claim for compensation, or other dispute, disagreement, or controversy concerning respective rights and obligations under the contract including any alleged breach or failure to perform and for remedies.

(2) Claimant--The department or prime contractor who submits a contract claim under this section.

(3) Commission--The Texas Transportation Commission.

(4) Committee--The Contract Claim Committee.

(5) Department--The Texas Department of Transportation.

(6) Department office--The department district, division, or office responsible for the administration of the contract.

(7) Department office director--The chief administrative officer of the responsible department office; the officer shall be a district engineer, division director, or office director.

(8) District--One of the 25 districts of the department.

(9) Executive director--The executive director of the Texas Department of Transportation.

(10) Prime contractor--An individual, partnership, corporation, or other business entity that is a party to a written contract with the state of Texas which is entered into and administered by the department under Transportation Code, §22.018, §391.091, Chapter 223, or Government Code, Chapter 2254, Subchapters A and B.

(11) Project--The portion of a contract that can be separated into a distinct facility or work unit from the other work in the contract.

(e) Contract claim committee. The executive director shall name the members and chairman of a committee or committees to serve at the executive director's pleasure. The chairman may add members to the committee, including one or more district engineers who will be assigned to the committee on a rotating basis, with a preference, if possible, for district engineers of districts that do not have a current contractual relationship with the prime contractor involved in a contract claim.

(f) Negotiated resolution. To every extent possible, disputes between a prime contractor and the department's project engineer should be resolved during the course of the contract.

(g) Procedure.

(1) Exclusive procedure. Except as provided in subsection (c) of this section, a contract claim shall be filed under the procedure in this subsection. A claim must be considered first by the committee before the claim is considered in a contested case hearing.

(2) Filing claim.

(A) The claimant shall file a contract claim after completion of the contract or when required for orderly performance of the contract. A claim shall be filed no later than one year after the earlier of the following:

(i) the department issues notice to the contractor that it is in default, or the department terminates the contract; or

(ii) the department issues final acceptance of the project that is the subject of the contract.

(B) The claimant shall file a contract claim request and a detailed report with the department's construction division, the department engineer under whose administration the contract was or is being performed, or the committee.

(C) If filed by a prime contractor, the claim shall include a certification as follows: I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the department is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(D) A defective certification shall not deprive the department of jurisdiction over the claim. Prior to the entry by the department of a final decision on the claim the department shall require a defective certification to be corrected.

(E) The construction division or department engineer shall forward the contract claim request and detailed report to the committee.

(3) Evaluation of claim by the committee.

(A) The committee's responsibility is to gather information, study the relevant issues, and meet informally with the prime contractor if requested. The committee shall attempt to resolve the claim.

(B) The committee shall secure detailed reports and recommendations from the responsible department office, and may confer with any other department office deemed appropriate by the committee. If the department is the claimant, the committee shall give the prime contractor the opportunity to submit a responsive report and recommendation.

(C) The committee shall afford the prime contractor an opportunity for a meeting to informally discuss the disputed matters and to provide the prime contractor an opportunity to present relevant information and respond to information the committee has received from the department office. Proceedings before the committee are an attempt to mutually resolve a contract claim without litigation and are not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph. All oral communications, reports, or other written documentation prepared by department staff in connection with the analysis of a contract claim are part of the attempt to mutually resolve a contract claim without litigation, and are also not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph.

(D) The committee chairman shall give written notice of the committee's decision on the claim to the department and prime contractor. The department and prime contractor are presumed to receive the decision three days after it is sent by United States mail.

(i) If the claimant does not object to the committee's decision, the claimant shall file a written statement with the committee's chairman stating that the claimant does not object. The claimant shall file the statement no later than 20 days after receipt of the committee's decision. The chairman shall then prepare a document showing the settlement of the claim including, when required, payment either to the department or to the prime contractor, and the claimant's release of all claims under the contract. The claimant shall sign it. The executive director may approve the settlement, or may request the commission to approve the settlement by issuance of an order. The executive director shall then implement the resolution of the claim, and if contemplated in the committee's decision, expend funds as specified in the decision.

(ii) If the claimant objects to the committee's decision the claimant shall file a petition with the executive director no later than 20 days after receipt of the committee's decision requesting an administrative hearing to litigate the claim under the provisions of §§1.21 et seq. of this title (relating to Procedures in Contested Cases).

(iii) If the claimant fails to file a written petition under clause (ii) of this subparagraph within 20 days of receipt of the committee's decision, the claimant waives his right to a contested case hearing. All further litigation of claims on the project or contract by the claimant shall be barred by the doctrines of issue and claim preclusion. The chairman shall then prepare an order implementing the resolution of the claim under the committee's decision, and stating that further litigation on the claim is prohibited. The executive director shall then issue the order and implement the resolution of the claim, and if contemplated in the committee's decision, expend funds as specified in the decision.

(4) Decision after contested case hearing. This paragraph applies if a contested case hearing has been held on a claim. The administrative law judge's proposal for decision shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(h) Claim forfeiture. A claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department in the proof, statement, establishment, or allowance thereof. In such cases the department shall specifically find such fraud or attempt and render judgment of forfeiture. This subsection applies only if there is clear and convincing evidence that a person knowingly presented a false claim for the purpose of getting paid for the claim.

(i) Relation of contract claim proceeding and sanction proceeding.

(1) Except as provided in paragraphs (2) and (3) of this subsection, the processing of a contract claim under this section is a separate proceeding and shall not affect the executive director's assessment of a contract sanction under Subchapter G of this chapter (relating to Contractor Sanctions).

(2) If a contested issue arises that is relevant both to a contract claim proceeding and a sanction proceeding concerning the same contract, the issue shall be resolved in the proceeding that the executive director refers first for a contested case hearing under Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases). If the issue is decided in the first proceeding that decision shall apply to and be binding in all subsequent department proceedings.

(3) This paragraph applies to a contract under which the parties agreed to submit questions which may arise to the decision of a department engineer. If a dispute under the contract leads to a contract claim proceeding or sanction proceeding, the engineer's decision shall be upheld unless it was based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment.

§9.6. Contract Claim Procedure for Comprehensive Development Agreement.

(a) Purpose. This section concerns processing and resolution of a claim under Transportation Code, §201.112 that arises under a comprehensive development agreement (CDA).

(b) Applicability.

(1) The executive director may enter into a CDA containing a claim procedure and provisions authorized by this section. When a claim arises under a CDA containing a claim procedure authorized by this section, the requirements of this section apply, §9.2 of this chapter (relating to Contract Claim Procedure) does not apply, and the parties shall follow the claim procedure contained in the CDA and shall be bound by the outcome of the claim procedure. If a CDA does not contain a claim procedure authorized by this §9.6, either by express reference to this section or by inclusion of provisions required or permitted by this section, then a claim under the agreement shall be processed and resolved under §9.2 of this chapter.

(2) The claim procedure and provisions authorized by this section may be applied to claims that arise under the CDA, related agreements that collectively constitute a CDA, or other agreements entered into with or for the benefit of the department in connection with the CDA. A CDA shall identify the related agreements and any other agreements to which the claim procedure and provisions apply.

(3) This section and §9.2 of this chapter do not affect or impede the department's or the developer's rights to seek judicial relief in connection with the following types of actions or proceedings, and the claim procedures and provisions in this section or in §9.2 of this chapter do not apply to such actions:

(A) equitable relief that the department is permitted to seek to the extent allowed by law;

(B) mandamus action that a developer is permitted to bring against the department or the executive director under Government Code, §22.002(c);

(C) mandamus relief sought by a developer under Transportation Code, §223.208(e) (relating to termination compensation and related security obligations); or

(D) other matters or disputes expressly excluded from the dispute resolution procedures authorized by this section, as specified in the CDA or other related agreement between the department and the developer that is part of the CDA.

(c) Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Claim--A claim for compensation, or other dispute, disagreement, or controversy concerning respective rights, obligations, and remedies under the CDA, or under related agreements that collectively constitute a CDA or other agreements entered into with or for the benefit of the department in connection with the CDA, including any alleged breach or failure to perform.

(2) Comprehensive development agreement (CDA)--An agreement with a developer that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of a project described in Transportation Code, §223.201(a), and may also provide for the financing, acquisition, maintenance, or operation of such a project. A CDA is also authorized under Transportation Code, §91.054 (rail facilities), and under Transportation Code, §227.023 (Trans-Texas Corridor). A CDA includes related agreements that collectively constitute a CDA or other agreements entered into with or for the benefit of the department in connection with the CDA.

(3) Department--The Texas Department of Transportation.

(4) Developer--The private entity or entities that enter into a CDA with the department.

(5) Disputes board--A group of one or more individuals appointed under the terms of a CDA to fairly and impartially consider and decide a claim between the department and a developer.

(6) Disputes board error--One or more of the following actions:

(A) a disputes board acted beyond the limits of its authority established under subsection (b)(3) of this section;

(B) a disputes board failed, in any material respect, to properly follow or apply the procedure for handling, hearing and deciding a claim established under the CDA and the failure prejudiced the rights of a party;

(C) a disputes board decision was procured by, or there was evident partiality by a disputes board member due to a conflict of interest (which may be defined in the CDA), misconduct (which may be defined in the CDA), corruption, or fraud; or

(D) any other error that the parties agree may be the subject of a contested case hearing, as set out in the CDA.

(7) Executive director--The executive director of the Texas Department of Transportation.

(8) Party--The department, or a developer who has entered into a CDA with the department. The department and the developer are together referred to as the "parties."

(9) SOAH--State Office of Administrative Hearings.

(d) Mandatory requirements. A CDA that authorizes the use of a claim procedure authorized by this section shall include (or incorporate by reference) provisions substantially consistent with the provisions in this subsection, but such provisions need not apply to claims excluded from the claim procedure under subsection (b)(3) of this section.

(1) A claim under the CDA that is not resolved by the informal dispute resolution process set forth in the CDA shall be referred to a disputes board for rendering of a disputes board decision on the claim.

(2) The processing of a claim shall include a mandatory informal dispute resolution process, such as mediation, and a mandatory dispute resolution procedure using a disputes board.

(3) The party making a claim shall include in its notice of the claim a certification by an authorized or designated representative to the effect that:

(A) the claim is made in good faith;

(B) to the current knowledge of the party, except as to matters stated in the notice of claim as being unknown or subject to discovery, the supporting data is reasonably believed by the party to be accurate and complete, and the description of the claim contained in the certification accurately reflects the amount of money or other right, remedy, or relief to which the party asserting the claim reasonably believes it is entitled; and

(C) the representative is duly authorized to execute and deliver the certificate on behalf of the party.

(4) The certification required under subsection (d)(3) of this section, if defective, shall not deprive a disputes board of jurisdiction over the claim. Prior to the entry by the disputes board of a final decision on the claim, the disputes board shall require a defective certification to be corrected.

(e) Permissive requirements. A CDA that provides for a claim procedure authorized by this section may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding claim resolution that are not contrary to the mandatory requirements of this section.

(1) The executive director shall adopt the decision of a disputes board as a ministerial act, subject to a party's right to request a contested case hearing in accordance with the terms of the CDA as to whether disputes board error occurred.

(2) A decision by a disputes board, upon completion of the procedure required in Transportation Code, §201.112, this section, and in the CDA, is final, conclusive, binding upon, and enforceable against the parties, subject to any appeals allowed by the CDA or this section.

(3) A disputes board, upon issuing a decision on a claim, is authorized to direct that an award be paid from the proceeds of any trust or other pool of project funds that the CDA provides shall be available for payment of such claims.

(4) The executive director's discretion or actions in connection with the resolution of a claim are limited or may be purely ministerial in certain circumstances, including:

(A) adoption of the disputes board's decision absent disputes board error;

(B) referral of a disputes board decision to SOAH to determine whether disputes board error occurred; and

(C) issuance of a final order based on the SOAH administrative law judge's proposal for decision.

(5) Certain claims may be categorized and treated by the parties as expedited claims, and informal resolution procedures shall be expedited for such claims.

(6) Certain claims may be categorized and treated by the parties as small claims, and informal resolution procedures shall be expedited for such claims.

(7) The parties may execute a related disputes board agreement, or similar agreement, which shall be part of the CDA and which may govern all aspects of the creation of and procedures to be followed by a disputes board.

(8) The evidence presented to a SOAH administrative law judge in a hearing regarding a claim, and to the Travis County District Court in any appeal, may include: the disputes board's written findings of fact, conclusions of law, and decision; any written dissenting findings, recommendation, or opinions of a disputes board member; all submissions to the disputes board by the parties; and an independent engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications, or other determinations, if any, delivered to the parties pursuant to the CDA and related to the claim under consideration.

(9) Certain decisions, orders, or determinations of the executive director may be deemed to have been issued as of a certain date, or after a prescribed number of days, and setting out the parameters of the deemed decision, order, or determination.

(10) The parties are authorized and required to comply with all or certain categories of interim orders of the disputes board, including discovery and procedural orders.

(11) Except as agreed to by the parties in writing, a disputes board shall have no power to alter or modify any terms or provisions of the CDA, or to render any award that, by its terms or effects, would alter or modify any term or provision of the CDA. Notwithstanding the prior sentence, a disputes board decision that contains error in interpretation or application of a term or provision of the CDA but does not otherwise purport to alter or modify terms or provisions of the CDA may not be appealed on grounds of such error; and such error does not deprive the disputes board of power or authority over the claim.

(12) A developer's claim for termination compensation, or to enforce the department's security obligations that secure payment of termination compensation, is not to be resolved under any dispute resolution procedure in the CDA. Rather, a developer may exercise its rights under Transportation Code, §223.208(e) (relating to Terms of Private Participation) by seeking mandamus against the department.

(13) At all times during the processing of a contract claim, the developer and its subcontractors shall continue with the performance of the work and their obligations, including any disputed work or obligations, diligently and without delay, in accordance with the CDA, except to the extent enjoined by order of a court or otherwise ordered or approved by the department in its sole discretion.

(f) Pass-through claim. A CDA may provide that a developer who is a party to a CDA with the department may make a claim on behalf of a subcontractor. In order to make such a claim the developer must be liable to the subcontractor on the claim.

(g) Mandatory requirements concerning disputes board. A CDA that authorizes the use of a disputes board shall include (or incorporate by reference) provisions substantially consistent with the provisions in this subsection.

(1) A disputes board is not a supervisory, advisory, or facilitating body and has no role other than as expressly described in the CDA, including, if applicable, any disputes board agreement.

(2) A disputes board member shall not have a financial interest in the CDA, in any contract or the facility that is the subject of the CDA, or in the outcome of any claim decided under the CDA, except for payments to that member for services on the disputes board. Any person appointed as a disputes board member shall disclose to the parties any circumstances likely to give rise to justifiable doubt as to such disputes board member's impartiality or independence, including any bias or any financial or personal interest in the result of the dispute

resolution or any past or present relationship with the parties or their representatives, or developer's subcontractors and affiliates.

(3) The scope of a SOAH contested case hearing on an appeal of a disputes board decision is limited solely to whether disputes board error occurred.

(h) Punitive damages. A disputes board shall have no power or jurisdiction to award punitive damages.

(i) Permissive requirements concerning disputes board. A CDA that authorizes the use of a disputes board may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding the disputes board that are not contrary to the specific requirements of this section.

(1) Each party shall endeavor to have a standing list of candidates from which to select a disputes board member. The CDA may specify the qualifications to be a board member, the procedure by which a party nominates a person to the list of candidates, and the method by which the other party may review and object to a proposed candidate. All disputes board members are chosen from the list of candidates of the department or of the developer.

(2) A disputes board conducts its proceedings in accordance with procedural rules specified in the CDA. The disputes board may allow for discovery similar to that allowed under the Texas Rules of Civil Procedure, and the admission of evidence conforming to the Texas Rules of Evidence, but may allow for exceptions to or deviations from such requirements and rules.

(3) The parties may jointly modify the procedure applicable to the disputes board's proceedings, under the provisions of the CDA.

(4) During the period that a disputes board member is serving on a disputes board, neither party may communicate ex parte with that member. A party may not communicate ex parte with a person on its list of candidates to be a disputes board member regarding the substance of a dispute.

(5) Each party is responsible for paying one-half the costs of all facilities, fees, support services costs, and other expenses of a disputes board.

(6) A disputes board does not have the authority to order that one party compensate the other party for attorney's fees and expenses.

(j) Permissive requirements on a contested case hearing. A CDA that authorizes the use of a contract claim procedure authorized by this section may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding a contested case hearing that are not contrary to the specific requirements of this section.

(1) The executive director's referral of a developer's request to SOAH for a contested case hearing as to whether a decision by a disputes board was affected by disputes board error is a purely ministerial act.

(2) If a determination is made after a contested case hearing that disputes board error occurred, the dispute shall be remanded to a disputes board for further consideration, except that if the error is lack of authority to hear the claim, the decision of the disputes board shall be vacated.

(3) The executive director's issuance of a final order following a contested case hearing is a purely ministerial act, and that if by inaction the executive director does not issue a final order within the time frame established by the CDA, then a final order in a form recommended by the administrative law judge shall be deemed to be automatically issued.

(4) As allowed by Government Code, §2001.144 and §2001.145, an order issued by the executive director after a contested case hearing is final on the date issued and no motion for rehearing is required to appeal the final order.

(5) An executive director's order remanding a dispute to a disputes board, or an executive director's order implementing a disputes board decision following a contested case hearing before SOAH, are subject to judicial review under Government Code, Chapter 2001, under the substantial evidence rule. Review is limited to whether disputes board error occurred.

(k) Other department rules on a contested case hearing.

(1) The parties may agree in the CDA to adopt, modify or not follow procedural provisions, deadlines, evidentiary rules, and any other matters set out in Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases).

(2) In the event of any conflict or difference between the procedures set out in this section or a CDA, and in Chapter 1, Subchapter E, the procedures in this section or the CDA shall govern with respect to any proceeding before SOAH.

(3) In the event of an appeal to SOAH of a disputes board decision:

(A) the department shall present a copy of this section to SOAH as a written statement of applicable rules or policies, under Government Code, §2001.058(c); and

(B) the parties shall request that the administrative law judge modify and supplement SOAH contested case procedures as necessary or appropriate, and consider this section, consistent with 1 TAC §155.3 (relating to Application and Construction of this Chapter).

(C) the parties shall provide the administrative law judge with a stipulation that the substantive provisions, scope of review, and procedural provisions of this section and the CDA shall apply to and govern the contested case proceeding before SOAH, consistent with 1 TAC §155.39(a) (relating to Stipulations).

(l) Mandamus relief. Nothing in this section shall restrict a developer's rights to seek mandamus relief pursuant to Government Code, §22.002(c) if the executive director fails to perform one or more of the ministerial acts set out in this section and included in the CDA as a ministerial act, or any other act specified in the CDA as a ministerial act.

(m) Confidential information.

(1) The parties may agree that, with respect to the mandatory informal dispute resolution process required under subsection (d)(2) of this section, communications between the parties to resolve a dispute, and all documents and other written materials furnished to a party or exchanged between the parties during any such informal resolution procedure, shall be considered confidential and not subject to disclosure by either party.

(2) The parties may agree that with respect to a proceeding before the disputes board, an administrative hearing before an administrative law judge, or a judicial proceeding in court, either or both parties may request a protective order to prohibit disclosure to third persons of information that the party believes is a trade secret, proprietary, or otherwise entitled to confidentiality under applicable law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604745
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-8683

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SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.10, 9.11, 9.17

The Texas Department of Transportation (department) proposes amendments to §§9.10, 9.11, and 9.17, concerning highway improvement contracts.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §361.231 provided for the award of turnpike improvement contracts. The section was repealed by H.B. 2702, 79th Legislature, Regular Session, 2005. Transportation Code, Chapter 223, which is currently cited in the rules, now provides for the award of highway improvement contracts for tolled state highways. References to Transportation Code, §361.231 are removed from §9.10, Purpose, and from the definitions of "Building contract," "Construction contract," and "Maintenance contract" in §9.11.

To improve clarity, minor changes to rule section citations have been made in §9.11(23) and §9.11(34).

Transportation Code, §223.0041, authorizes the department to award a maintenance contract for less than $300,000 to the second lowest bidder if the lowest bidder withdraws its bid after bid opening. This statute further directs the department to adopt rules governing the conditions under which the withdrawal of the bid of the lowest bidder and consideration of contract award to the second lowest bidder will be allowed. Section 9.17 is being amended to include building maintenance contracts. This will allow the department to avoid the detrimental effects of delaying needed building maintenance.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for local governments and minimal fiscal implications for the state as a result of enforcing or administering the amendments. The cost savings of approximately $15,000 per year is due to the fact that the department will no longer incur advertising, printing, or administrative costs associated with the re-bidding process. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Zane Webb, Director, Maintenance Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Webb has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the expedited maintenance of department buildings. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.10, 9.11, and 9.17 may be submitted to Zane Webb, Director, Maintenance Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 9, 2006.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.0041, which authorizes the department to adopt rules regarding the award of certain maintenance contracts to the second lowest bidder.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §223.0041.

§9.10. Purpose.

The sections under this subchapter prescribe the policies and procedures governing bidder qualification, bidding, award, and execution of a contract entered under Transportation Code, Chapter 223, Subchapters A - C [~~or Transportation Code, §361.231~~].

§9.11. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (5) (No change.)

(6) Bidder--An individual, partnership, limited liability company, corporation, or joint venture submitting a bid for a proposed contract.

(7) - (9) (No change.)

(10) Building contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, [~~or Transportation Code, §361.231,~~] for the construction or maintenance of a department building or appurtenant facilities. Building contracts are considered to be highway improvement contracts.

(11) - (14) (No change.)

(15) Construction contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, [~~or Transportation Code, §361.231,~~] for the construction or reconstruction of a segment of the state highway system.

(16) - (22) (No change.)

(23) Historically underutilized business (HUB)--Has the meaning assigned by §9.51(16) [~~§9.51(17)~~] of this chapter.

(24) - (25) (No change.)

(26) Maintenance contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, [~~or Transportation Code, §361.231,~~] for the maintenance of a segment of the state highway system.

(27) - (33) (No change.)

(34) Small business enterprise (SBE)--Has the meaning assigned by §9.51(22) [~~§9.51(23)~~] of this chapter.

§9.17. Award of Contract.

(a) - (c) (No change.)

(d) For a maintenance contract for a building or a segment of the state highway system involving a bid amount of less than $300,000, if the lowest bidder withdraws its bid after bid opening, the executive director may recommend to the commission that the contract be awarded to the second lowest bidder.

(1) - (4) (No change.)

(e) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604746
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 8, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

DIVISION 1. GENERAL PROVISIONS

31 TAC §65.25

The proposed amendments to §65.25, published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1197), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604774

♦ ♦ ♦

DIVISION 2. OPEN SEASONS AND BAG LIMITS--HUNTING PROVISIONS

31 TAC §§65.54, 65.56, 65.62, 65.66

The proposed amendments to §§65.54, 65.56, 65.62, 65.66, published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1203), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604775

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 720. 24-HOUR CARE LICENSING

SUBCHAPTER D. STANDARDS FOR HABILITATIVE AND THERAPEUTIC FAMILY HOMES

40 TAC §720.206

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed repeal of §720.206 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912).

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604686
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 24, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER E. STANDARDS FOR FOSTER FAMILY HOMES

40 TAC §720.236

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed repeal of §720.236 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912).

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604687
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 24, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER F. STANDARDS FOR FOSTER GROUP HOMES

40 TAC §§720.308, 720.320, 720.321

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed repeal of §§720.308, 720.320, 720.321, which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912).

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604688

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 24, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER G. STANDARDS FOR HABILITATIVE AND THERAPEUTIC GROUP HOMES RESPONSIBLE TO A CHILD-PLACING AGENCY AND FOR INDEPENDENT HABILITATIVE AND THERAPEUTIC GROUP HOMES

40 TAC §720.369, §720.373

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed repeal of §720.369 and §720.373 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912).

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604689
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 24, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER I. STANDARDS FOR ASSESSMENT SERVICES

40 TAC §720.602, §720.604

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed repeal of §720.602 and §720.604 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912).

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604690
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 24, 2006
For further information, please call: (512) 438-3437

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CHAPTER 748. GENERAL RESIDENTIAL OPERATIONS AND RESIDENTIAL TREATMENT CENTERS

SUBCHAPTER E. PERSONNEL

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §748.511

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.511 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1940).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604520
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT

DIVISION 6. ANNUAL TRAINING

40 TAC §748.933

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.933 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1949).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604521
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER I. SERVICE MANAGEMENT

DIVISION 2. EMERGENCY ADMISSION

40 TAC §748.1267

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.1267 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1958).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604522
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER J. CHILD CARE

DIVISION 2. MEDICAL CARE

40 TAC §748.1537

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the

proposed new §748.1537 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1964).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604523
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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DIVISION 3. COMMUNICABLE DISEASES

40 TAC §748.1585

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.1585 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1966).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604524
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER L. MEDICATION
DIVISION 1. ADMINISTRATION OF MEDICATION

40 TAC §748.2007

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.2007 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1973).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604525
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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DIVISION 7. USE OF PSYCHOTROPIC MEDICATION

40 TAC §748.2251

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.2251 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1977).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604526
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER N. EMERGENCY BEHAVIOR INTERVENTION
DIVISION 2. TYPES OF EMERGENCY BEHAVIOR INTERVENTION THAT MAY BE ADMINISTERED

40 TAC §748.2457

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.2457 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1980).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604527
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER T. ADDITIONAL REQUIREMENTS FOR OPERATIONS THAT PROVIDE ASSESSMENT SERVICES
DIVISION 3. ASSESSMENT PLAN

40 TAC §748.4367

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §748.4367 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2015).

Filed with the Office of the Secretary of State on August 22, 2006.

TRD-200604528
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 22, 2006
For further information, please call: (512) 438-3437

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CHAPTER 749. CHILD-PLACING AGENCIES
SUBCHAPTER E. AGENCY STAFF AND CAREGIVERS
DIVISION 1. GENERAL REQUIREMENTS

40 TAC §749.611

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.611 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2046).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604609
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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DIVISION 6. CONTRACT STAFF, VOLUNTEERS, AND STUDENT INTERNS

40 TAC §749.765

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.765 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2051).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604610
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT
DIVISION 6. ANNUAL TRAINING

40 TAC §749.943

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.943 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2055).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604611
Gerry Williams
General Counsel
Department of Family and Protective Serives
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER I. FOSTER CARE SERVICES: SERVICE PLANNING, DISCHARGE
DIVISION 1. SERVICE PLANS

40 TAC §749.1303

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.1303 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2065).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604612
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER J. FOSTER CARE SERVICES: MEDICAL AND DENTAL
DIVISION 1. MEDICAL AND DENTAL CARE

40 TAC §749.1407, §749.1419

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.1407 and §749.1419 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2069).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604613
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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DIVISION 2. ADMINISTRATION OF MEDICATION

40 TAC §749.1465, §749.1467

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services, withdraws proposed new §749.1465 and §749.1467 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2071).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604614
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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DIVISION 8. USE OF PSYCHOTROPIC MEDICATION

40 TAC §749.1601

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws pro-

posed new §749.1601 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2075).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604615
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

♦ ♦ ♦

SUBCHAPTER L. FOSTER CARE SERVICES: EMERGENCY BEHAVIOR INTERVENTION
DIVISION 2. TYPES OF EMERGENCY BEHAVIOR INTERVENTION THAT MAY BE ADMINISTERED

40 TAC §749.2057

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §749.2057 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2083).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604616
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER S. ADOPTION SERVICES: ADOPTIVE PARENTS
DIVISION 5. PRE-ADOPTION CONSUMMATION ACTIVITIES

40 TAC §749.3723

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §749.3723 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2115).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604617
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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SUBCHAPTER T. ADDITIONAL REQUIREMENTS FOR CHILD-PLACING AGENCIES THAT PROVIDE ASSESSMENT SERVICES
DIVISION 3. ASSESSMENT PLAN

40 TAC §749.3867

The Health and Human Services Commission, on behalf of the Department of Family and Protective Services withdraws the proposed new §749.3867 which appeared in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2117).

Filed with the Office of the Secretary of State on August 23, 2006.

TRD-200604618
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: August 23, 2006
For further information, please call: (512) 438-3437

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 5. BUDGET AND PLANNING OFFICE

SUBCHAPTER B. STATE AND LOCAL REVIEW OF FEDERAL AND STATE ASSISTANCE APPLICATIONS

DIVISION 1. INTRODUCTION AND GENERAL PROVISIONS OF TEXAS REVIEW AND COMMENT SYSTEM

1 TAC §5.195

The Office of the Governor adopts an amendment to 1 TAC §5.195 concerning the Texas Review and Comment System without changes to the proposed text published in the June 16, 2006, issue of the *Texas Register* (31 TexReg 4819).

The amendment adds 28 new programs for review, deletes 19 programs no longer in existence or no longer of widespread interest and conforms programs numbers to current listings in the Catalog of Federal Domestic Assistance.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Government Code, Title 7, §772.004 and §772.005, and the Local Government Code, Chapter 391, §391.008, which authorizes the Office of the Governor to provide for review of state and local applications for grant and loan assistance and to establish policies and guidelines for review and comment. Chapter 391 of the Local Government Code requires certain applicants for state or federal assistance to submit their applications for review to the appropriate regional planning commissions and directs the governor to issue guidelines for carrying out such reviews.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604804
Katherine Knight
Assistant General Counsel
Office of the Governor
Effective date: September 17, 2006
Proposal publication date: June 16, 2006
For further information, please call: (512) 463-3471

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §§25.502, 25.504, 25.505

The Public Utility Commission of Texas (commission) adopts an amendment to §25.502, relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas; new §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region; and new §25.505, relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region. The amendment and new rules are adopted with changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1575).

The amendment and new rules establish basic elements of the Energy Reliability Council of Texas (ERCOT) wholesale market design, under authority given the commission under Chapter 39 of the Public Utility Regulatory Act (PURA).

The amendment and new sections are needed to address the interrelated issues of market power, high prices induced by scarcity, investment in generation, and the ability of electricity customers to respond to high prices by reducing demand.

PURA Chapter 39, adopted in 1999, established the framework to implement a competitive electricity market in Texas. In adopting PURA Chapter 39, the Legislature announced the legislative policies and purposes that supported the implementation of customer choice. The Legislature specifically indicated, in PURA §39.001(a), that Chapter 39 was enacted "to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Recognizing that the electricity market in ERCOT would not be fully competitive at the time the retail market opened in January 2002, the commission adopted certain provisions to help protect the public interest during the transition to competition.

In Docket Number 23220, *Petition of the Energy Reliability Council of Texas for Approval of the ERCOT Protocols*, Order on Rehearing (June 1, 2001), the commission found that the establishment of bid caps (or offer caps) was a necessary "circuit breaker" or backstop to prevent the possible exercise of market power by generation entities. Accordingly, the commission ordered ER-

COT to establish an offer cap of $1,000 per mega-watt-hour (MWh) for energy that it procures from generation resources. The offer cap was to expire on July 4, 2003 because the commission anticipated that by that date, "any generation entity market power issues will have been better addressed through other means." The Order on Rehearing in Docket Number 23220 also directed ERCOT to file a report with the commission, by October 1, 2001, concerning the implementation of the ERCOT Protocols and recommending various wholesale market design changes.

The commission considered ERCOT's report in Docket Number 24770, *Report of the Energy Reliability Council of Texas (ERCOT) to the PUCT Regarding Implementation of the ERCOT Protocols*. On August 23, 2002, the commission issued Order No. 14 in Docket Number 24770, requiring that the offer price for ancillary services provided to the ERCOT system could not exceed $1,000/MWh for energy and $1,000/mega-watt (MW) per hour for capacity. On April 23, 2002, the commission issued Order No. 20, lifting the July 4, 2003 expiration date for the offer cap established in Docket Number 23220. In its final Order in Docket Number 24770, the commission indicated that it would periodically review the continued need for offer caps.

Also in Docket Number 24770, the commission considered the effect that "hockey-stick" bidding had upon prices for balancing energy during an ice storm on February 24 - 25, 2003. On May 29, 2003, the commission issued Order No. 22, in which it concluded that it was appropriate to protect the ERCOT market from the impact of hockey-stick bidding and ordered ERCOT to implement a mitigation procedure known as the Modified Competitive Solution Method (MCSM), which limited the impact of hockey-stick bidding when conditions in the ERCOT market suggested that physical or economical withholding might be present. To provide a further deterrent to inappropriate bidding and other forms of gaming, the commission required ERCOT to adopt a "sunshine policy," identifying any bidder who submitted a balancing energy bid in excess of $900 whenever the market clearing price for energy (MCPE) exceeded $900. This complemented the policy already in the ERCOT Protocols requiring next-day identification of entities submitting up balancing energy offers priced higher than $300 per MWh or down balancing energy offers priced less than -$300 per MWh. The commission also indicated that it would defer consideration of other mitigation methods to a subsequent rulemaking project dealing more broadly with market-failure mitigation.

Subsequent to Docket Number 24770, the commission adopted §25.502, relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas, effective January 9, 2005. Section 25.502(h) codified the offer caps established in Docket Number 24770. Section 25.502(d) changed the level at which the "sunshine policy" established in Docket Number 24770 was initiated from $900 per MWh to $300 per MWh, to reflect a Protocol revision voluntarily adopted by ERCOT market participants.

In July 2002, the commission initiated Project Number 26201, *Rulemaking to Address Enforcement of Wholesale Market Rules*, to address the possibility of market power abuse or other forms of market manipulation in the ERCOT market. Project Number 26201 culminated in the adoption of §25.503 of this title, relating to *Oversight of Wholesale Market Participants*, in February 2004. Section 25.503 established the standards that the commission applies in monitoring the activities of entities participating in the ERCOT market, and includes provisions listing the duties of market participants and identifying certain prohibited activities. In comments filed in Project Number 26201, some persons suggested that it would be beneficial if the commission defined the term "market power" as used in §25.503. Because such action was beyond the scope of Project Number 26201, the commission did not adopt a definition of "market power" at that time, but indicated that a definition would be proposed in a future rulemaking project. The commission instituted Project Number 29042, *Rulemaking on Definition of Wholesale Electric Market Power in the ERCOT Power Region*, in December 2003.

In Docket Number 23220, the commission also considered the issue of maintaining an adequate planning reserve margin in ERCOT after the implementation of competition. The commission noted the healthy reserve margin then available in ERCOT (about 25% over forecasted firm demand for summer, 2001) but was concerned whether there were appropriate incentives to maintain a sufficient reserve margin in the future. The commission expressed a desire to rely upon market forces to the greatest extent possible but stated that it "must decide whether the adequacy of reserve margins should be left to market forces, or whether regulations should be created to help ensure a minimum reserve margin and, if so, what regulatory method should be used." In June 2001, the commission initiated Project Number 24255, *PUC Investigation of the Need for Planning Reserve Margin Requirements*, to investigate whether the adequacy of generating-capacity reserve margins should be left to market forces, or whether other means should be created to help ensure a minimum reserve margin.

In October 2005, the commission consolidated these different subjects into a single project so that the impact of revisions in one area could be reflected in the other subjects if necessary. This would facilitate a consistent approach to these important subjects. As a result, in October 2005, the commission merged Projects Nos. 24255 and 29042 into the current project, Project Number 31972. Additionally, the commission decided that issues related to MCSM would also be reviewed in this project.

In this project, the commission is adopting a definition of the term "market power" that is consistent with the definition that is commonly used by the courts. The adoption of this definition will provide additional certainty to market participants as to how the commission will apply the provision of §25.503. The definition will also assist the independent market monitor (IMM) appointed pursuant to §25.365 of this title, relating to *Independent Market Monitor*, in performing its duties. As a result, the commission anticipates that the commission's ability to identify and address market power abuses will be enhanced.

One of the broad objectives of this project is to change the market rules to provide greater assurance that generation companies and developers will invest in the resources needed to supply the electric needs of customers in ERCOT. The means that the commission is adopting to do so is to allow prices to rise in response to a scarcity of resources in the market. The chief alternative to allowing energy prices to rise, in order to provide incentives for investment, is to establish a formal capacity market. The commission considered, earlier in this project, adopting a capacity market for the ERCOT region. Some other regions of the country have tried to provide incentives for investment in generation capacity by adopting capacity markets, such as the installed capacity or ICAP market in the PJM Interconnection. The commission concluded that such markets represent additional regulation, rather than a market approach to providing incentives for investment. These markets have been costly to customers, and

there have also been questions about whether they are effective in inducing developers to invest in new generating facilities. The Federal Energy Regulatory Commission said of such markets in its 2004 Staff report on the state of the markets:

The capacity markets of the Northeast are one major effort to address this issue. Other possible approaches include letting energy prices rise to clear the market and traditional utility planning. Much of the country has no obvious market mechanism to signal the need for new building in advance of shortages. *The success of capacity markets in addressing the issue is not yet proven*.

Allowing energy prices to rise involves modifying the existing offer caps in the market and repealing MCSM. MCSM was intended to serve as a mitigation procedure to protect the market from the impact of hockey-stick bidding in circumstances unlikely to be related to true supply scarcity. It has served that purpose but has also resulted in unpredictable after-the-fact adjustments in market prices, which have undermined the incentive value of high prices in the balancing energy market. The rules adopted in this order, along with features of the new nodal market to be implemented in 2009, will address a broader set of market design issues in a way that should eliminate the concern over hockey-stick bidding in the ERCOT market. The commission's enhanced enforcement capability, as well as the additional disclosures required by the rules, will deter market manipulation more effectively than MCSM. Accordingly, the rule as adopted requires ERCOT to stop using MCSM as of October 1, 2006.

The level of planning reserve margins in ERCOT remains adequate but has declined since the commission addressed the subject in Docket Number 23220. Because of this, the commission has reviewed the offer caps and disclosure requirements that it imposed as part of that decision and the decision in Docket Number 24770. Offer caps, like MCSM can mitigate high prices that would otherwise result from scarcity of resources in the market. The ERCOT market has continued to mature since that time. In addition, prior concerns about the commission having sufficient enforcement tools to prevent market power abuse have been addressed. Therefore, in order to encourage the development of additional resources in Texas, the offer caps previously established in §25.502(h) are replaced with a series of offer caps that will increase gradually as ERCOT moves toward the implementation of a nodal market in 2009. To further the "sunshine policy" that the commission announced in Docket Number 24770 related to hockey-stick bidding, the commission is requiring additional public disclosure of disaggregated pricing data by market participants. Greater transparency of pricing information should deter generation companies from offering unreasonably high prices and should permit broader scrutiny of questionable prices by other market participants and the general public. This broad scrutiny should help in the identification of prices that are the result of market manipulation or market power abuse. These two issues (the level of the price caps and the disclosure rules) are interrelated in their effect on the ERCOT market, and they are a part of a coherent approach to modifying the ERCOT market rules.

The adopted rules also require ERCOT to prepare various reports based upon information provided by market participants, which will allow the commission and other interested persons to monitor the ERCOT reserve margin and need for resources on an on-going basis. This information will enable buyers, sellers and investors to forecast more accurately the need for additional electrical supply in a timely manner and to take appropriate action.

The adopted rules use competitive rather than regulatory methods to achieve the goals of PURA, considering the current stage of development of the ERCOT market. As adopted, the rules are necessary to meet the legislative policy of protecting the public interest during the transition to and in the establishment of a fully competitive electric power industry. The amendment and new sections are competition rules subject to judicial review as specified in PURA §39.001(e). The amendment and new sections are adopted under Project Number 31972.

Comments on the published proposal were received from The Alliance for Retail Markets (ARM); CenterPoint Energy Houston Electric, LLC, (CenterPoint); City of Austin d/b/a/ Austin Energy (Austin Energy); City Public Service of San Antonio, d/b/a/ CPS Energy (CPS Energy); Comverge, Inc.; Constellation Energy Commodities Group, Inc. and Rio Nogales Power Project, L.P. (Constellation Energy); Denton Municipal Electric (DME); the Electric Reliability Council of Texas, Inc. (ERCOT); Energy Data Source LP (EDS); FPL Energy, LLC; Good Company Associates Inc. (Good Company); Lower Colorado River Authority (LCRA); NRG Texas LLC (NRG); Nucor Steel-Texas (Nucor); Occidental Chemical Corp. (Occidental); Office of Public Utility Counsel (OPC); Reliant Energy, Inc. (Reliant); South Texas Electric Cooperative, Inc. (STEC); Texas Electric Cooperatives, Inc. (TEC); Texas Industrial Energy Consumers (TIEC); TXU Cities Steering Committee (TXU Cities); TXU Generation Company LP and TXU Portfolio Management Company LP (collectively, TXU Wholesale); a group comprising Chaparral Steel, EDS, Frontier Associates LLC, and Good Company Associates (collectively, Various parties interested in demand-side issues, or Various Parties); and a group comprising American National Power, Inc., Constellation Energy Commodities Group, Coral Power, LLC, Exelon Generation Co., L.L.C., FPL Energy, LLC, NRG, Sempra Global, and SUEZ Energy Marketing NA, Inc. (collectively, Joint Commenters).

Reply comments were received from ARM, CPS Energy, ERCOT, Joint Commenters, Nucor, OPC, Reliant, STEC, TEC, TXU Wholesale, and TXU Cities.

A public hearing on the amendment and proposed sections was held at commission offices on May 2, 2006, at 9:30 a.m. The comment at the public hearing was limited to a request that the commission provide general clarification about what it expects an energy-only market to provide, and about the role of reserve forecasting. The commission's discussion herein of issues raised in written comments addresses CenterPoint's request.

Preamble questions

In the preamble of the proposed rule as published in the *Texas Register*, the commission invited interested persons to comment on specific questions posed by the commission. The questions, along with the comments and the commission's responses are presented prior to a discussion of other comments on the proposed rules.

1. Definition of market power. The term "exclude competition" is used by the U.S. Supreme Court in the seminal antitrust case *U.S. v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed.2d 1264 (1956). Earlier versions of this proposed rule replaced "exclude" with "impair." Please comment on which term would be more suited to a definition of market power applicable to a wholesale electricity market.

OPC, Reliant, STEC and TEC favored use of the word "impair." Reliant said that "exclude" would set a more difficult standard for a finding of market power, as it would preclude the commission from acting until an entity alleged that it was the victim of anticompetitive behavior that either prevented it from entering the market or forced it to exit the market. Reliant further said that "impair" was not inconsistent with the Supreme Court's use of "exclude" in determining the standard for a violation of the Sherman Antitrust Act. While a finding that an entity "impaired competition" does not rise to the level of a violation of antitrust laws, Reliant said, PURA does not require such a standard. PURA §39.157(a) defines market power abuse as practices that "unreasonably restrict, impair or reduce the level of competition," Reliant noted. The commission's responsibility is to allow competition to work, Reliant said, and the commission has the discretion to determine that market power has impaired competition to the point of requiring a solution without waiting for a violation of the Sherman Antitrust Act.

TEC said the ability to impair competition was of primary concern to its members. It asserted that the largest generators in ERCOT do not need to exclude competition in order to benefit from abusive market behavior, adding that their sheer size allows them to benefit simply by withholding generation from the market, thereby abusing wholesale consumers in the marketplace. In its reply comments addressing various commenters, however, TEC expressed its concerned that the proposed market power rules have been compromised to the degree that no firm could be proven to have market power, and that the future of the ERCOT power market will be marked by recurrent price spikes, which will amount to nothing more than a wealth transfer from buyers to sellers participating in the Up Balancing Energy (UBES) market.

STEC said that "impair" was more suitable to use in the definition of market power in a competitive wholesale power market that has not been fully developed. STEC said that while a generator knows it cannot exclude another party from entering into competition in the short term, an entity with market power can place more risk on competitors, force smaller parties to raise their prices to a level that is no longer competitive, and then undercut the prices long enough to weaken the competitor so it can no longer compete. By the time the larger generator accomplished its goal of erecting a barrier to entry, STEC said, the competitive market will have failed. STEC concluded that it is in the exercise of market power in the smaller incremental steps that must be recognized.

On the other hand, Austin Energy, Joint Commenters, NRG, and CPS Energy favored the term "exclude." Austin Energy said "exclude competition" was appropriate if the commission's intent is to rely on the *DuPont* decision and its related case law. Austin Energy asked for clarification as to whether the test for market power is the ability to control prices and exclude competition. CPS Energy also said use of "exclude" would permit the use of the substantial case law. However, CPS Energy further said that the definition should explicitly except periods of scarcity, saying that it would be inappropriate to apply a definition of market power to such periods.

NRG commented that "impair" was vague, and that the commission should augment its proposed definition with that used by the U.S. Department of Justice (DOJ) in its "Horizontal Merger Guidelines." NRG also said the rule should clarify that "competitive levels" of prices include the levels of scarcity prices necessary for an energy-only market to succeed.

Joint Commenters said that the term "exclude" comports with antitrust law, is supported by PURA, and fits the market power abuses in question. "Impair" is too vague and too broad, the group said.

TXU Wholesale recommended that the commission abandon the *DuPont* definition and instead adopt the definition included in the DOJ's "Horizontal Merger Guidelines." TXU Wholesale said that using a definition that simply captures any ability to control prices appears susceptible to use as a way to apply a pivotal-supplier test, which does not properly test for market power. TXU Wholesale said the pivotal-supplier test has been rejected by the commission and should not be resurrected through an overly broad and incorrect definition of market power. In reply comments, Joint Commenters agreed with TXU Wholesale that the DOJ definition is clearer than the definition in the proposed rule and repeated their preference for the DOJ definition. Joint Commenters said they supported the definition in the proposed rule (using "exclude") as a way of resolving a contentious issue, but added that they would oppose excluding the legal precedents surrounding the DOJ definition from the application of the definition in the proposed rule.

TXU Cities supported a definition that accounts for the use of individual or collective means to raise prices above a competitive level, but stated that the commission should not include the concept of trying to identify the ability to control prices focused upon a single generation entity. The definition proposed by TXU Cities focused on "the existence of market prices for energy and capacity together above a competitive level," without testing whether such prices were caused by any individual entity.

Commission response

The commission finds that the definition contained in the *DuPont* case is appropriate for use in determining the existence of market power in the ERCOT markets. Under this definition, market power exists if an entity has the ability to control prices *or* the ability to exclude competition.

The commission declines to adopt the definition of market power contained in the DOJ's "Horizontal Merger Guidelines" as proposed by some commenters. The DOJ definition is too narrow and does not reach all of the aspects of market power that the commission must address under PURA §39.157. In a statement to the Committee on the Judiciary of the United States House of Representatives on July 28, 1999, the DOJ acknowledged that its authority "to enforce the antitrust laws with respect to the electric power industry does not sufficiently address the ability of electric utilities to exercise market power that can thwart free competition within the industry." The Guidelines clearly indicate that they are only concerned with "horizontal acquisitions and mergers subject to ... section 1 of the Sherman Act." The courts have held that section 1 of the Sherman Act only applies to concerted action, not unilateral conduct. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). Courts may impose antitrust liability on the basis of unilateral conduct only under section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The types of market power abuses that the commission is charged with addressing under PURA §39.157 are primarily based upon unilateral conduct (*e.g.*, withholding of production), although collusion by multiple parties is also included. These actions are more analogous to violations of section 2 of the Sherman Act. In contrast, PURA §39.158 deals with mergers and acquisitions

and specifies a standard of review not based on the definition of "market power" but based on the level of installed generation capacity specified in PURA §39.154. This analysis is analogous to the DOJ's use of market share analysis to determine whether concerted action violates section 1 of the Sherman Act. Accordingly, the commission finds that the definition of market power used by the DOJ for reviewing mergers is not sufficient for all of the types of conduct that the commission must review under PURA §39.157. The commission finds that the definition from the *DuPont* case, which is used in cases involving section 1 of the Sherman Act, is more appropriate for the determination of the existence of "market power" in the ERCOT markets.

In adopting this definition, the commission stresses two important points. First, simply having market power is not a violation of PURA or commission rules. The existence of market power is a necessary precondition to a finding of market power abuse, but by itself it does not imply any wrongdoing. Second, the definition of market power addresses *capability* and therefore need only address what an entity *can* do. The definition does not require that market power be exercised before it can be found to exist.

Although the commission is not using the term "impair competition" as some parties suggested, that does not mean that the commission will not review whether a market participant's actions can impair competition in ERCOT. PURA §39.157 clearly directs the commission to address market power abuses, which include practices that "tend to unreasonably restrict, *impair*, or reduce the level of competition." (Emphasis added.) The commission notes that the definition of "exclude" in Webster's *Ninth New Collegiate Dictionary* includes "to expel or bar esp. from a place previously occupied," as well as "to prevent or bar the entrance of." Therefore, the use of the term "exclude competition" covers both actions that prevent new participants from entering the market and actions that cause existing participants to leave the market. In response to the comments requesting that the commission use the term "impair competition," the commission is adding the statutory definition of "market power abuse" to the adopted rule. This will provide assurances to those commenters that the commission is cognizant of its statutory role under PURA §39.157 and will clarify the commission's intent in adopting the *DuPont* definition of "market power."

The adoption of the *DuPont* definition does not mean that the commission has rejected the pivotal-supplier test as a market power screen. While the rule does not require the use of a pivotal-supplier test, neither does it preclude its use in determining the existence of market power. The commission believes that it is premature to rule on the appropriateness of using a pivotal-supplier test for two reasons. First, the soon-to-be-appointed Independent Market Monitor (IMM) should be given enough flexibility to make an initial determination, in accordance with the IMM's own professional judgment, concerning what type of market power screen--including a pivotal-supplier test--is appropriate for the ERCOT market. Second, in the absence of the IMM's recommendations concerning market power screens, the commission prefers at this time to judge the appropriateness of any particular market power test and its detailed methodology in the context of an enforcement proceeding where such a test is being used as evidence of market power. To be clear, the commission did not reject the pivotal-supplier test; it rejected the idea that this rule should endorse any particular test. A party may choose to offer a pivotal-supplier test as evidence of market power, and if sufficiently supported, the test may be found valid by the commission.

The commission declines to adopt the definition of market power proposed by TXU Cities. The analysis of market power, as courts have developed it in the context of antitrust law, focuses on the size and other advantages of particular firms in a relevant market. The analysis may include an examination of whether a firm may be able to set prices at levels that are above the competitive market price. Nonetheless, the focus is on particular firms, and the commission concludes that a similar analysis is required here. It appears that TXU Cities' definition would result in all market participants being found to have market power if even one generator received "excessive returns." The commission also concludes that PURA primarily focuses on specific firms and their size and conduct. To the extent that market power exists and is exercised by groups of market participants, it may be addressed through the prohibition on collusion contained within PURA §39.157 and §25.503(g)(6) of this title. PURA §39.001 evidences a clear Legislative policy to support competition in the production and sale of electricity. The overbroad definition of market power proposed by TXU Cities conflicts with this policy.

2. Disclosure of disaggregated data. With respect to proposed §25.505(f), the commission seeks comment on potential commercial impacts of disclosing disaggregated, resource/qualified scheduling entity (QSE) specific, offer and quantity information two days after real-time and disclosing other information after 30 days. The commission has received general comments on the potential impacts of the disclosure of disaggregated offer information, but requests that commenters please articulate clear examples of potential commercial impacts to your company that will result from disclosure of each specific type of information and how the rule could be revised to address those impacts.

OPC supported the market-transparency provisions of §25.505(f), saying that disclosure would bring tremendous benefits to the market and that market participants will likely be able to make better business decisions with the added information than without. It said the commission should analyze the consequences of asymmetric information in the market, i.e. the ability of some market participants to glean the information on their own while the information is unavailable to others.

Noting that ancillary service capacity offers and energy offer curve information are the most critical pieces of information to be made available under the rule, Reliant recommended making aggregate data available within 24 hours. Entity-specific data for entities that do not qualify for the market power exemption established by §25.504 should be disclosed within 48 hours, with other entities' data disclosed later (but sooner than 30 days.) Reliant noted that any potential commercial impacts on entities due to this increased market transparency must be balanced with the necessity for load-serving entities to have confidence that market prices are driven by competition, not by abuses of market power. Reliant added that dynamic schedules are not as crucial as offer curve data and could be disclosed later. It also noted, however, that in a nodal market entities could provide generation output schedules for resources not providing an energy offer curve, which could be a method of exercising market power.

Reliant also said that because "firm scheduled load" and "scheduled load" are not defined terms in the protocols for a nodal market, "firm" should be deleted in reference to a nodal market. It said further that "bids with 'up to' limits" would be appropriate. Reliant also noted that ERCOT will be unable to post actual load data as required by subsection (f)(2)(D) until settlement is complete 180 days after the operating day.

Austin Energy recommended disclosing disaggregated data after 30 days (rather than 48 hours) and aggregated data after 60 days (rather than 30 days). Generally, Austin Energy said that untimely disclosure could give an asymmetric advantage to sellers, allowing sellers to artificially raise prices to consumers. It cited disclosure of resource output and self-arranged quantities as examples. Austin Energy also said sellers may be subjected to intense public scrutiny of legitimate business decisions, which would be warranted only when it can be established by the commission that the benefit of public disclosure of an entity's otherwise privileged business data clearly outweighs the negative competitive consequences to the entity. Austin Energy also said real-time information (other than market prices) would not create additional incentives for investment.

With respect to disclosure of disaggregated data, STEC commented that the disclosure requirements would allow larger market participants to gain critical resource and scheduling information about smaller market participants, thereby allowing the larger entities to impair the competitive ability of the smaller entities. As an example, STEC said a larger entity could use the information to create significant congestion for smaller entities under a nodal market design, thereby making electric cooperatives and small municipal utilities more hesitant to opt for competition. Only the larger companies would have the staff and resources to effectively analyze and use such information, STEC said.

CPS Energy supported the release of disaggregated information at 6 months, as it is currently practiced by ERCOT. At a minimum, CPS Energy argued, the confidentiality must be maintained for three months after the operating day.

CPS Energy emphasized that PURA does not authorize the disclosure of disaggregated information from municipally-owned utilities as required by the proposed rule. CPS Energy cited PURA §40.004 and stated that it expressly limits the commission's jurisdiction over MOUs to certain purposes including requiring reports of municipally-owned utilities only to the extent necessary to enable the commission to determine the aggregate load and energy requirements of the state. Since the proposed disclosure is not necessary for the commission to determine the state's aggregate load and energy requirements, it is impermissible, CPS Energy concluded. In its reply comments, STEC supported CPS Energy's comments.

Joint Commenters said that while market transparency benefits competition, disclosure of confidential business information harms competition. They commented that market transparency does not mean disclosure of information protected by law; that the Legislature, Congress and the courts have held that protecting transaction-specific information serves the public interest; that parties advocating quick disclosure of information are advancing that position because the information is commercially valuable; and that disclosure could neutralize a company's efforts to earn revenues from market advantages accomplished through prudent management, efficiency, investment and innovation, and heighten its risk associated with temporary or longer-term market vulnerabilities. Joint Commenters disputed the statement in the preamble to the proposed rule that disclosure "will enhance competition and will also enhance the commission's enforcement efforts by providing increased scrutiny of market participants by other market participants and the public." They said that under PURA, assessing market competitiveness is a function not of market participants but of the IMM and the commission, and that PURA requires the protection of competitively sensitive information.

While most of Joint Commenters' analysis addressed disclosure in general terms, one point they made addressed the specific question posed by the commission in the preamble. Continuous disclosure of bid curves rather than simply market-clearing prices can reveal far more new information about small entities than large ones, Joint Commenters said, thereby harming small suppliers significantly more than large suppliers. They also said large competitors are more likely to have resources to use that information in competing against small competitors.

Joint Commenters also contended that a rulemaking is not an appropriate procedure for imposing disclosure requirements such as those that would be required under subsection (f)(2). They cited a Texas Supreme Court ruling in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d. 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), that said an agency may not adopt a rule classifying specific types of information subject to the Texas Public Information Act (TPIA) as confidential. Joint Commenters asserted that the proposed rule implicitly determines that the specified disaggregated data are confidential for the 48-hour period of non-disclosure, and explicitly determines that the data are not confidential after that period. The court held that an agency could not bring information within the TPIA exception for confidential information by promulgation of a rule, Joint Commenters said, therefore an agency also cannot, without express authority, adopt a rule classifying specific types of information as not confidential. They added that public interests involving disclosure can be protected through a variety of procedures, including TPIA requests, attorney general opinions, and ERCOT Protocol procedures.

Any disclosure requirement should not discriminate among market participants, Joint Commenters said. They opposed Reliant's suggestion of having greater disclosure for large market participants, even though the Joint Commenters membership comprises mostly small suppliers. They also said the commission should not adopt the provision before the Texas Supreme Court decided whether to hear an appeal of the Third Court of Appeals' decision in *Public Utility Commission v. City of Garland, et.al., (City of Garland)* 165 S.W.3d 814 (Tex. App. - Austin 2005, pet. denied).

TXU Wholesale argued against the release of the data within 48 hours, and stated that the disclosure would allow the sophisticated market participants to use such information in a perfectly legal manner to the disadvantage of the overall ERCOT market. TXU Wholesale stated that by using the information, sophisticated market participants would be able to determine the market positions of particular market participants (whether long or short in generation supply among other things). This knowledge is invaluable in negotiating bilateral contracts. Additionally the disclosure of the information would allow sophisticated market participants to track price gaps in the ERCOT-administered auctions and fill those gaps with offers that raise the average clearing prices over time. Constellation agreed that their market positions could be discerned and they would be harmed by this disclosure. They noted that anonymity of position allows market participants to offer and bid closer to where they are willing to transact, rather than where they will make the most profit.

Constellation stated that the proposal to release entity-specific information would publicly disclose and thus destroy the commercial value of competitively sensitive information and trade secrets of Constellation and other market participants and the release of entity-specific information even after 90 days could be problematic in some instances.

FPL noted its belief that there are problems that result from the disclosure of the information after 48 hours. The first is that the information would likely be used by other market participants to manipulate ERCOT markets to secure commercial advantage at the expense of those who disclose information in good faith. The second is that this would result in the ERCOT markets becoming increasingly hostile to new market participants, increasingly less attractive to new generation investment by current market participants and increasingly less robust and competitive.

Commission response

The commission disagrees with the argument of CPS Energy that the commission's authority over municipally-owned utilities is limited to the authority granted by PURA §40.004. The new rules do not create any new requirement for market participants to provide reports to the commission, so reliance on PURA §40.004 is misplaced. The rules only address disclosure of information that market participants provide to ERCOT to enable ERCOT to perform its functions as an independent organization under PURA, including the scheduling of transactions and the acquisition of ancillary services. PURA §35.004(e) requires the commission to ensure that ancillary services are available at reasonable prices and are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive. PURA §35.001 includes a municipally-owned utility within the definition of electric utility for purposes of PURA Chapter 35. Additionally, PURA §39.151(d) allows the commission to adopt and enforce rules related to the operation of ERCOT and other independent organizations established by the commission. PURA §39.151(j) requires that ERCOT market participants, expressly including municipally-owned utilities, must comply with the rules and Protocols adopted by ERCOT and authorizes the commission to bring an enforcement action against a market participant that fails to comply with the Protocols. The commission finds that these statutory provisions give the commission sufficient authority over ERCOT and market participants, including municipally-owned utilities, to require the disclosure of the information addressed in the rule.

Confidentiality of information provided to ERCOT is currently addressed in Section 1.3 of the ERCOT Protocols. Pursuant to Protocol Section 1.3.1.1, much of the information addressed in the proposed rule is treated as confidential. However, Section 1.3.3 states that the protected status that applies to the confidential information expires 180 days after the applicable operating day. The time limit on the protection provided by the Protocols indicates that such information is not confidential for all time. If the information was a trade secret *per se*, the disclosure of which would reveal business strategies or business formulas, it would presumably remain confidential indefinitely. Because the Protocols allow disclosure after 180 days, the information is currently available to competitors after that time. During the past four-year period, ERCOT routinely has released the information after 180 days. Potential competitors therefore already have access to this information, on a delayed basis, and can perform the "reverse engineering" that the commenters apparently fear. Therefore, any potential impact from the disclosure of the information has already occurred, and the rule does not create the threat to disclosure as alleged by the commenters.

Requiring disclosure of information does not conflict with the public policy expressed in PURA §39.001(b)(4) that the commission should "ensure the confidentiality of competitively sensitive information." The rule does ensure the confidentiality of competitively sensitive information, but only for the period of time in which it is competitively sensitive. By operating under the existing ERCOT Protocols, the market participants are implicitly agreeing that their claims of confidentiality expire over time. The question faced by the commission is whether 180 days is an appropriate period of time; in other words, do the claims of confidentiality become stale after a shorter period of time, and, if so, is the public interest served by mandating shorter disclosure timelines? The commission has received conflicting suggestions on this issue, ranging from disclosure after only 48 hours to disclosure pursuant to the current 180-day time period in the Protocols. Based upon the comments, the commission has determined that it is appropriate to limit the period of time during which some information is considered competitively sensitive.

Contrary to the arguments from some commenters, the commission may make this decision in a rulemaking proceeding and need not conduct a contested case for such purpose. The Administrative Procedure Act (APA), Texas Government Code §2001.003(6) defines a "rule" as "a state agency statement of general applicability that implements, interprets, or prescribes law or policy." The courts have recognized that, "unless mandated by statute, the choice to proceed by general rule or by ad hoc adjudication is one that lies primarily in the informed discretion of the agency." *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 799 (Tex. Civ. App. - Austin 1982, writ ref'd n.r.e.) Because the current disclosure requirements are addressed in the ERCOT Protocols, which are similar to rules, and because these disclosure requirements will affect all market participants in the same manner, the commission determines that it is particularly appropriate to use the rulemaking process to address the issue in this instance. Cases cited by Joint Commenters for the proposition that an agency cannot *expand* the list of exemptions to public disclosure are not relevant to the question of whether an agency can establish a rule related to a schedule for the disclosure of information.

The commission disagrees with comments that the now-final Third Court decision in the *City of Garland* case prevents the commission from addressing disclosure standards for market participants or requires the commission to adopt a different standard for public power utilities. The opinion in *City of Garland* only addressed the cities' claims of confidentiality of certain contract information under §552.133 of the Texas Government Code. The Court, in a footnote, stated, "We express no opinion regarding the Commission's power to determine for itself other claims of confidentiality, including assertions based upon other TPIA exceptions." Therefore the decision does not preclude the commission from determining whether market information submitted to ERCOT should be disclosed to the public.

The decision also does not compel a different standard for municipally-owned utilities. PURA §35.004(e) requires that ERCOT's acquisition of ancillary services shall not be unreasonably discriminatory or anticompetitive. Having two different standards is inconsistent with this requirement. Further under §552.133 of the Texas Government Code, a public power utility's designation of a matter as confidential can be overturned if (1) the governing board of the public power utility failed to act in good faith or (2) the information is not reasonably related to a competitive matter. "Competitive matter" is defined as a matter that is "related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors." The commission questions how requiring a municipally- owned utility to disclose information subject to the same requirements that apply to all other market participants could be considered to "give advantage to competitors

or potential competitors." Because the rule creates a level playing field relative to the disclosure of disaggregated information, it does not provide a competitive advantage to any market participant. The commission believes that a decision by the governing body of a public power utility to insist on a different and more advantageous position concerning disclosure would be subject to attack as not being made in good faith. For these reasons, the commission declines to adopt a different standard for public power utilities.

As noted previously, since the start of retail open access, the commission has viewed the level of the offer cap and the appropriate amount of information disclosure to be interrelated. Because the commission has decided to increase the offer caps in order to encourage greater investment in generation and load resources in Texas, it believes that such increases must be accompanied by increased disclosure of the information that affects the operation of the ERCOT market. The increased disclosure will help to ensure that price changes are the result of a properly functioning competitive market and not the result of market power abuse or other market manipulation. The commission agrees with comments suggesting that it should require a more rapid disclosure of certain market information.

However, the commission is also sympathetic to the concerns expressed by other commenters that the time periods contained in the proposed rule as published may have been too short. The disclosure of large amounts of information after 48 hours, as originally proposed, could allow some market participants to use the information to the detriment of other participants. In order to avoid this result, the commission agrees that, for most of the information subject to the rule, disclosure after 48 hours is not necessary or appropriate.

In balancing the concerns of the commenters on both sides of this issue, the commission has determined that it would be appropriate to change the disclosure requirement on a gradual basis. This will enable both the commission and the market participants to become accustomed to the new disclosure procedure and make any necessary changes to their operations. The implementation schedule for disclosure is also being tied to the schedule for increases to the offer cap, thereby further emphasizing the commission's decision that these two issues are interrelated. Under the revised disclosure schedule contained in the rule, effective March 1, 2007, most of the required disaggregated information will be disclosed 90 days after the day for which the information was accumulated. This is one-half of the current disclosure timeframe of 180 days, but much longer than the 48 hour to 30 day time periods contained in the proposed rule. On the same date, the offer cap contained in the rule will increase from $1,000 per MWh to $1,500 per MWh. Effective March 1, 2008, the disclosure of disaggregated information will take place 60 days after the date the information was accumulated. This corresponds to the date that the offer cap is increased to $2,250 per MWh. Finally, two months after the market begins operation under a nodal market design (approximately March 1, 2009), the disclosure period is reduced to 30 days while the offer cap is raised to $3,000 per MWh.

One major exception to this disclosure schedule concerns offer curves for balancing energy and ancillary services. These two areas raise the greatest concerns about the possibility of market power abuse and other market manipulation. In order to provide greater transparency to the public and other affected market participants in these areas, the commission believes that it is appropriate to require the disclosure of offer curves for these services on a more expedited basis. Balancing some market participants' concerns about disclosure against the greater need for public scrutiny, the commission concludes that, as a general rule, the offer curves should be disclosed 30 days after the day for which the information was accumulated, beginning October 1, 2006, rather than the previously proposed 48 hours.

However, the commission believes that there is an important public objective to be served by requiring the disclosure of pricing information soon after market prices are determined. Offers that set market prices should be subject to public scrutiny and discussion, without the constraints of confidentiality. In order to facilitate such scrutiny and discussion, the commission believes that some basic information should be subject to disclosure after 48 hours. The commission is revising the rule to require disclosure of only the amount of the highest-priced offer selected or dispatched by ERCOT and the name of the entity submitting that offer. This information would be provided for each interval and, if interzonal congestion is involved, the disclosure would provide the required information for each separate zone. Thus under the rule as revised, ERCOT would post the following information 48 hours after the day for which it was accumulated: the date, the interval, the name of the entity(s) involved, and the price (and, if applicable, the zone involved). The rule requires the posting of the highest price selected but not all of the offer curve associated with that price, and it is not requiring 48 hour disclosure of the names of entities other than the one whose bid is the highest selected. Two months after the start of operation of the nodal market, the requirement for posting of information for separate zones would be deleted and ERCOT would only be required to post the information for the highest-priced offer selected or dispatched by ERCOT for each interval on an ERCOT-wide basis. By limiting the 48-hour disclosure requirement in this fashion, the commission can provide public information concerning the entity that had the greatest impact on the market clearing price without affecting other market participants. In adopting this disclosure requirement, the commission emphasizes that the disclosure of information after 48 hours pursuant to this rule does not imply any wrongdoing by the market participant whose information is disclosed.

The commission agrees with comments that the scope of the information to be disclosed under the proposed rule was too broad. The proposed rule required the disclosure of certain load information on an accelerated basis. The commission believes that rapid disclosure of this information is not needed to address the market manipulation concerns noted previously. Accordingly, the commission has revised the rule language by omitting the requirement to disclose this load information on an accelerated basis. This action also addresses some of the concerns expressed by commenters that disclosure could impact the competitive position of market participants. The commission has also clarified the rule language in some areas to more correctly state the disclosure requirements. Finally, because the commission is adopting a schedule for phased implementation of the disclosure requirements, there may be some confusion concerning when the requirements of §25.502(d) would expire. To avoid any confusion, the commission revises §25.502(d)(4) to indicate that the subsection expires on October 1, 2006.

3. Credit requirements. The commission seeks comment on whether the credit requirements for QSEs in the current ERCOT Protocols will be sufficient if the offer caps are raised to the levels proposed in §25.505(f)(i). If the current requirements will not be sufficient after the adoption of the proposed rule, should modifications or additional credit requirements be specified in a

commission-sponsored rulemaking, or left to the ERCOT stakeholder process? If such modification or additional requirements should be specified in this rulemaking, then please provide recommended language and corresponding rationale, for possible adoption as part of §25.505.

OPC stated that the credit requirements are based on the exposure of an entity to default and that a relaxation of the offer caps would increase the price exposure of the market participants and therefore their credit exposure. OPC commented that to maintain the same level of credit protection in a regime where energy prices are likely to be higher requires higher credit requirements. OPC, Reliant, and STEC all noted that higher credit requirements could create a barrier to entry and cautioned the commission to be mindful of this concern while trying to strike an appropriate balance. OPC opined that the ERCOT stakeholder process and the credit working group tend to emphasize protecting the marketplace over worrying about barriers to entry, because it is impossible to have new entrants into the market represented by stakeholders. OPC commented that left alone ERCOT will modify its credit requirements to recognize the new risk.

In its comments Joint Commenters noted that in an energy-only market, generation investment will be recovered in select hours instead of over 8760 hours of the year. Load serving entities (LSEs) that "ride" the balancing energy market instead of contracting for energy with a wholesaler will run the risk of running up huge debt within a short period of time. Joint Commenters commented that credit requirements would have to be increased. Joint Commenters stated that this question reflects concern that some LSEs would not hedge against this potential risk and imperil the rest of the market. Joint Commenters noted that in the Australian market the credit requirements reflect this increased socialized risk. Joint Commenters stated that if the commissioners receive appropriate credit recommendations in comments the issue should be addressed in §25.505, but Joint Commenters did not make any specific recommendations.

ERCOT commented that it believes it has sufficient latitude and flexibility under the current ERCOT Protocols to make timely adjustments to QSE collateral requirements for changes in a QSE's credit exposure. ERCOT noted that the changes the rule contemplates would increase the potential for volatility in the market and ERCOT would continue to develop and use the tools it needs to perform the monitoring necessary to reduce to subsequent risk to the market. In reply comments ERCOT stated that it agreed with commenters who stated that the ERCOT stakeholder process was the appropriate forum to make changes to the credit requirements should the commission deem them appropriate.

Reliant commented that the ERCOT credit requirements are sufficient if offer caps are raised provided that the ease of LSE market entry is matched by defaulting LSE removal from participation in that market because allowing the transfer of the defaulting LSE's customers to provider of last resort as soon as possible reduces the exposure of the remaining market participants to the defaulting LSE's credit insufficiency. Reliant advocated using the stakeholder process to determine the appropriate credit requirement should the commission decide that ERCOT's current requirements are insufficient for the implementation of the higher offer caps.

NRG stated that the ERCOT stakeholder process is adequate to address the credit requirements but agreed with other commenters that some broad guidance from the commission is appropriate considering that an energy-only market would produce potentially volatile and higher energy prices.

STEC commented that while it understands what the commission is endeavoring to accomplish through the high low offer caps in this rule, the answer to this question demonstrates the fallacy of the rule's use of these offer caps as an answer to solve the problem of resource and reserve adequacy. STEC contended that it is unlikely that the current credit requirement will be sufficient to protect the market participants from bearing additional costs due to defaults caused by rising power costs. STEC expressed concern for smaller entities forced into the spot market due to facility outages, noting that larger entities seldom incur unnecessary costs to protect their customers from unjust enrichment from certain players. STEC was concerned that higher credit risk is harmful for entities that provide power using the cooperative model because they operate at cost. STEC argued that government should refrain from placing credit risks on market participants and also commented that the commission should not address those credit requirements in the rule, but rather should give the stakeholders the opportunity to address the issue first.

CPS Energy opined that even if the rule achieves its goal of providing for resource adequacy it will fail in its objectives if that resource adequacy is paid for by an uplift of bills left unpaid by the market. CPS Energy stated that while the rule recognizes that adequate credit standards are important it is unclear what "credit standards ... consistent with this section" means. CPS Energy believed it would be difficult to provide specific credit requirements in the rule and that such development should be left to the ERCOT stakeholder process. CPS Energy further recommended that §25.505(g) be deleted from the rule and that the commission recognize the need to establish appropriate and equitable credit standards for QSEs in the rule's preamble based on the increased potential financial exposure that could result for the ERCOT market from the implementation of §25.505.

In reply comments, Reliant agreed with CPS Energy' recommendation to delete §25.505(g) from the proposed rule.

Austin Energy supported stricter collateral standards in ERCOT if the offer caps are raised. Austin Energy believed that the ERCOT Credit Working Group is the proper forum for discussions and recommendations for credit requirements. Austin Energy recommended that the commission direct the working group to consider the credit implications of the higher offer caps and that ERCOT provide a report and recommendations to the commission within 60 days of the final adoption of §25.505.

In reply comments ARM and ERCOT disagreed with Austin Energy's recommendation to require an accelerated timeline for ERCOT's Credit Working Group to resolve the credit issues. ARM commented that it would be more reasonable to give stakeholders the time required to achieve consensus. ARM argued that the outcome of the negotiations could be considered by the commission in the context of the protocols required to be developed to implement the energy-only market. Reliant stated in reply that the commission has oversight of the protocols and should monitor the market's response to the changes that result from the rule's implementation.

TXU Wholesale offered specific recommendations addressing its concerns regarding increased credit exposure. TXU Wholesale stated that increased risk requires strengthening of the credit requirements and the commission must specify what the credit requirements should be. First, TXU Wholesale suggested

that ERCOT change its total estimated liability calculation from 40 days of market exposure to a minimum of 60 days of market exposure, and preferably 90 days of market exposure. Second, the balancing energy factor should be set higher to allow ERCOT to mitigate a higher percentage of the potential exposure. Third, ERCOT should use commercially reasonable measures to be more vigilant in monitoring the credit-worthiness of QSEs. Fourth, ERCOT should use the daily peaking price, not the daily weighted average price to create a more realistic approximation of an at-risk load shape. Fifth, a QSE's scheduling privileges should be suspended when its Estimated Aggregate Liability reaches 85% of its posted security, rather than when it reaches 100%.

In reply comments ARM disagreed with TXU Wholesale that the current credit requirements are not sufficient for the higher caps proposed for the energy-only market. ARM agreed with ERCOT that the current credit requirements have the flexibility to set a QSE's collateral requirements and that stakeholders can work to develop additional proposals on the issue. ERCOT and Reliant also disagreed with TXU Wholesale's comments asking the commission to direct ERCOT to make specific changes and again recommended the stakeholder process as the forum for considering the changes sought by TXU Wholesale.

DME expressed concerns about how the credit requirements would be determined. It noted the logic in increasing the requirements due to the higher caps but was also concerned that more stringent credit requirements would impose disproportionate impacts on smaller market participants. It requested that the commission give due consideration to the potential impacts of the credit requirements on the smaller entities. DME stated that while it was not opposed to letting the stakeholders deliberate and present a recommendation to the commission regarding credit in the energy-only market it would like to see the commission have direct involvement in the process, even if only to have final approval or disapproval of any stakeholder developed credit requirements.

LCRA commented that it did not believe that the credit requirements under the current resource adequacy structure are adequate and although it supports the ERCOT process for changing the protocols, the credit issue is a sensitive and difficult issue that has major policy implications for the market. Therefore, LCRA supported a commission rulemaking regarding the ERCOT credit standards with the involvement of market participants, but did not support including language in §25.505 regarding credit.

Reliant disagreed with LCRA that the commission should institute a rulemaking to affect any changes relating to credit standards.

STEC replied that the credit issues should not be resolved in this rulemaking but that it believed a rulemaking addressing the issue is desirable because commission, stakeholder, and ERCOT involvement are all necessary.

ARM supported the language in the rule as proposed and opposed any effort to modify ERCOT's credit requirements through a commission rulemaking proceeding. Any impact on credit requirements posed by the resource adequacy rule should be dealt with through the ERCOT stakeholder process. However, ARM did not believe any changes would be necessary. The credit process is already designed to increase credit requirements when credit exposure increases and the nodal protocols introduce additional credit requirements on QSEs with respect to participation in the day-ahead market and congestion revenue right auction. The additional information made available through the proposed rule in the form of the projected assessment of system adequacy (PASA) allows a market participant to hedge its risk and therefore better manage exposure in the market. The proposed rule also requires protocols to be filed with PUCT; therefore market participants could propose amendments to credit requirements as part of that process.

ARM suggested that the rulemaking is not the appropriate forum to debate the merits of various potential approaches to reforming the ERCOT credit standards and it would be more appropriate to address the issue in the stakeholder process. This has the advantage of developing a set of standards that are supported by a majority of market participants.

TEC stated that raising the high cap (HCAP) would have two effects on QSEs, namely, increased revenues for those entities that have excess capacity and increased risk for those QSEs that have to shore up their energy supplies in the balancing energy services market. TEC said that larger firms with large generation portfolios would benefit. As credit requirements are predicated on market risk, the requirements of smaller QSEs are likely to increase and the requirements to larger firms, decline. This is unacceptable and increases the gap between the larger and smaller firms.

Commission response

The commission agrees with CPS Energy and other commenters who commented that the energy-only resource adequacy mechanism may require a re-evaluation of the existing credit standards and that the language in the proposed rule was not adequate. The comments demonstrate that the issue of appropriate credit standards is complex and related to a number of changes that are occurring in the market. The necessary review of the issue cannot be accomplished in the relatively short time remaining for the review of the proposed rule. Therefore the commission deletes §25.505(g) from the rule. Further, the commission encourages the market participants to work together to address this issue and, at this time, will leave any changes in ERCOT's credit policies to the ERCOT stakeholder process. The commission will monitor the development of credit requirements along with the implementation of the energy-only resource adequacy mechanism and may raise this issue again in the future if sufficient progress is not made.

4. Considerations in setting the levels of the system-wide offer cap. The commission seeks comment on the appropriate levels of the system-wide offer caps from the implementation date of §25.505 through 2009. When commenting on this issue, please address what factors impact your answers, including those listed below:

(a) The appropriate length (number of hours) and intensity (level of prices) of scarcity pricing for the ERCOT market. For instance, greater number of hours allowed for scarcity pricing would result is a lower cap applied in each hour to reach the $150,000 threshold in proposed §25.505(i)(5)(iv). Conversely, a shorter time would allow a higher individual cap. The commission seeks input on how to balance these two variables.

(b) The appropriate level of the HCAP that would strongly encourage forward contracting for resources by load-serving entities.

(c) The projected reserve margin through 2010, as presented in ERCOT's most recent report on capacity, demand, and reserves.

(d) The level of HCAP that would encourage more demand-side participation (industrial loads, large commercial loads, small commercial loads, residential loads, energy efficiency programs) in current or planned ERCOT-operated markets (both real-time and centralized day-ahead). Please include a discussion of what factors, besides the level of the offer cap, may influence loads to increase their demand-side response in these markets.

CPS Energy said that both theory and experience support an offer cap that is no lower than $7,500 per MWh, noting that for the 88 hours during the year when the highest demand occurs, the ERCOT and Australian load duration curves are quite similar. Joint Commenters, quoting an earlier filing with the commission, noted that the load duration curve of the entire Australian National Electricity Market Management Company (NEMMCO) market is different from ERCOT, and the comparison with South Australia and Victoria is not appropriate.

CPS Energy contended that actual scarcity pricing only occurred 0.20% of the time, or about 17.5 hours per year, implying an offer cap of $8,500 in ERCOT. In Australia during 2004, prices were above $A3,000 (Australian dollars) during these times and accounted for more than 16% of the generator revenues ($A1.2 billion out of $A7.7 billion). CPS Energy inferred that the application of the equivalent of a $3,000 per MWh offer cap that removed over $A1 billion in revenue from the $A7.7 billion Australian electricity market would have significant negative implications for investment and resource adequacy in that energy-only market.

CPS Energy noted that most economists define scarcity conditions in electric markets as periods of shortage when supplies are insufficient to meet energy and ancillary service demands in real time. CPS Energy said it was difficult to reconcile this definition of scarcity with the expectation in the proposed rule that scarcity pricing will occur in the ERCOT market for 50 hours per year. CPS Energy questioned whether prices could reach scarcity levels at times that, by the standard economic definition, are not representative of true scarcity conditions.

According to CPS Energy, if scarcity conditions are defined to mean periods of shortage when supplies are insufficient to meet energy and ancillary-service demands in real time, then reaching such price levels for such a duration is extremely unlikely. CPS Energy suggested defining scarcity pricing conditions as all the time periods when demand is greater than 93% of the projected peak demand, when planning reserve margins for the year are calculated to be less than 12.5%, and when supplies are insufficient to meet energy and ancillary service demands.

Commission response

The commission acknowledges that the resource adequacy mechanism in the rule is based upon the Australian wholesale electricity market, adjusted to meet the specific circumstances of the ERCOT market. However, the commission notes differences between the ERCOT and the Australian NEMMCO markets that suggest that the offer cap in ERCOT does not need to be at NEMMCO's level to meet the resource adequacy needs of the ERCOT market. The higher offer cap in NEMMCO was developed to account for the duration curve in the South Australia and Victoria areas, which reflect sharper peaks than in ERCOT. Because of this and other differences, the commission finds that ERCOT does not require an offer cap to be set at NEMMCO levels to meet ERCOT's resource adequacy needs.

CPS Energy and Joint Commenters, in their comments, asked the commission to provide a definition or some guidance on what constitutes scarcity pricing. The commission believes that such a definition is unnecessary. The rule permits prices to rise to the level of the HCAP for a limited number of hours. The rise to these levels could be caused by legitimate scarcity conditions, but they could also be the result of market power abuse. It will require significant analysis to recognize instances in which prices rise as a consequence of market power. Providing a definition of scarcity would not facilitate the operation of the pricing mechanisms set out in the rule or the identification of market power abuses. Defining "scarcity pricing" would, however, risk legitimizing a high price that was in fact the result of market power abuse. Therefore, the commission declines to adopt a definition of "scarcity pricing."

Joint Commenters included an analysis of the market power rule and energy-only resource adequacy mechanism by Dr. Ross Baldick that supported the contention by Joint Commenters that the proposed rule would not provide generators with sufficient opportunities to recover their fixed costs under the proposed energy-only resource adequacy rule. Dr. Baldick's analysis was based on numerous premises and assertions, including: offer prices by generators are never more than 25% above marginal costs, and the highest energy offer price is not more than 25% above the highest marginal cost; use of reserves to produce energy is not reflected in the energy price; energy prices will reach their system-wide offer cap only during periods of involuntary load curtailments, which ideally should be no more than three hours per year; high-demand years occur on average only one out of three years, meaning that peakers make zero inframarginal profits two out of three years; about 18 hours a year of prices at the system-wide offer cap means that many hours of rotating blackouts would occur; load resources will refuse to participate in the market if their offers are accepted too frequently; and price caps to load resources should be higher than to generators for demand response to occur.

Commission response

Much of the analysis and conclusions presented by Dr. Baldick were based on a series of assumptions, hypotheses and statements that were unrealistic, not supported by experience and appeared to reflect a misconception of the rule and of certain details in the Texas Nodal Protocols. There is no support, for example, for the assumption that generators' offers do not exceed 25% above their marginal costs. ERCOT has experienced market clearing prices in excess of $600 per MWH, which is clearly more than 25% above the marginal costs of most of the units in ERCOT. Furthermore, to the extent that MCSM and the current $1,000 offer cap may have prevented higher prices, those constraints are being loosened or eliminated by the new rules. As discussed later in this order, the peaker net margin (PNM) is being increased to twice the annualized fixed cost of a new peaker. This should allow greater opportunity for low capacity-factor units to recover their fixed costs. In addition, the Texas Nodal Protocols have a provision for a "proxy generator" that will introduce scarcity pricing into the real-time energy market when responsive reserves are being deployed. Projections about the frequency and duration of involuntary load curtailments also fail to reflect the impact that the higher offer caps will have on load participation in the market. Further, there is no support for the assumption that prices approaching the system-wide offer cap can only occur during rolling blackouts. Finally, as discussed later, the commission has decided to eliminate the emergency load response (ELR) concept at this time, so assumptions and objections based upon the ELR mechanism are not applicable

to the rules as adopted. For these reasons, the commission has not adopted Dr. Baldick's recommendations.

CPS Energy, in its reply comments, noted that those who advocated the maintenance or reduction of the current $1,000 per MWh offer cap either did not understand the economics and incentives that must be present for an energy-only resource adequacy mechanism to be successful, or are actually advocating for the ultimate abandonment of the energy-only idea in favor of a capacity market. Though CPS Energy still prefers a capacity market approach to resource adequacy, its comments reflect a desire to make the commission's choice of an energy-only resource adequacy mechanism succeed in meeting the physical requirements of the system and the economic principles that are embodied in an energy-only market design.

Commission response

The commission agrees with CPS Energy that the maintenance or reduction in the current $1,000 per MWh offer cap is not compatible with a sustainable energy-only resource adequacy mechanism.

Reliant stated that the scarcity pricing mechanism (SPM) should not be adopted because it moves away from competitive market solutions and instead overlays a prescriptively administered regulatory construct. Reliant stated its concern that there will be insufficient demand response in ERCOT for the energy-only market design to work. Reliant stated that there are demand-side technological flaws such as the lack of metering and real-time billing for sizeable portions of the load that ultimately point to a capacity market alternative for ERCOT. Reliant renewed its opposition to an energy-only resource adequacy mechanism.

Reliant expressed the opinion that regulators would be unable to distinguish between scarcity pricing and market power abuse and that bilateral contracting was a risk management tool, not a resource adequacy issue. Reliant noted that from 1999 through 2005, ERCOT experienced a wave of generation construction without contracting requirements. Joint Commenters, in their reply comments, disagreed with Reliant's position that bilateral contracts were a risk management issue and not a resource adequacy issue. Joint Commenters stated that bilateral contracts were both a risk hedging instrument and one way to finance new generation capacity.

Commission response

The commission agrees with Reliant that the ERCOT market needs more price-responsive load in place and it will be taking steps to remove impediments to market-based demand response in Project Number 32853, *Evaluation of Demand-Response Programs in the Competitive Electric Market*. The commission believes that by working with the IMM, it will be able to distinguish between market power abuse and legitimate scarcity pricing. In any event, the difficulty in differentiating market power abuse and scarcity does not warrant adopting an alternative resource-adequacy mechanism.

NRG did not support the proposed system-wide offer caps and stated its concern with the overall direction of the rule. NRG stated that during the vast majority of high demand hours, there will be significant competitive pressure on generators to bid, which disciplines prices regardless of mitigation measures. NRG stated that the proposed caps are far too low to work, given the infrequency and irregularity with which real supply scarcity can occur in a market with adequate resources. Because there will be few hours of scarcity pricing--from 2 to 20 hours per year--energy prices will need to consistently reach averages that may be as low as $4,000 per MWh to as high as $30,000 per MWh. NRG cited statements in the *2004 State of the Market Report for the ERCOT Wholesale Electricity Market* as evidence that unmitigated bids alone would lead to insufficient scarcity pricing.

Commission response

The commission disagrees that the system-wide offer cap needs to be as high as NRG has suggested. The commission notes that the *2004 State of the Market Report* was written about a market with a $1,000 offer cap. While the commission agrees that a $1,000 offer cap is not sustainable in an energy-only resource adequacy mechanism, the comments in the *State of the Market Report* are not indicative of the sustainability of an energy-only resource adequacy mechanism with an offer cap of $3,000 per MWh.

NRG stated that an energy-only mechanism must be augmented by other mechanisms that will dependably set very high prices whenever reserve levels are compromised or threatened. NRG called for the development of explicit reserve shortage energy-pricing mechanisms that can produce scarcity pricing without relying on offers from the market.

NRG stated that experience with chronically under-supplied markets in other regions suggests that as reserve margins erode, reliability is degraded and policymakers become increasingly concerned about the potential for sustained periods of high prices that could erode popular support for competition and that are easily confused with the exercise of market power, as was seen in the energy crisis in California. Joint Commenters stated that because the offer cap is applied to all generation units, not just those that could be used to abuse market power, the proposed rule's offer cap is not aimed at market power abuse.

Consistent with recommendations by Drs. Patton and Hogan, NRG proposed that energy prices be directly set at appropriately high levels when reserve levels are at risk of being degraded. Joint Commenters offered a different but comparable approach by suggesting that the commission add a new subsection in the rule to raise the offer cap to $10,000 per MWh when there is insufficient capacity offered in the market to meet ERCOT's ancillary service needs. Joint Commenters noted that this proposal addresses what it perceives as the failure of the rules to specify the conditions when scarcity pricing arises. NRG supported the Joint Commenters suggestions to modify the SPM. In its reply comments, CPS Energy recommended that the rule require an administrative demand curve but recommended that the specific mechanics should be reserved for resolution through the stakeholder process.

In its reply comments, ARM urged the commission to reject this approach. ARM expressed its strong opposition to administratively reducing scarcity pricing in balancing energy prices when reserves are depleted. ARM emphasized that scarcity prices have occurred under the existing rules within the bounds of the current caps. ARM stated that the proposed less-than-5% market power safe harbor mechanism will ensure that small entities will be able to attempt to extract scarcity rents through balancing energy prices when such entities are pivotal during scarcity conditions. These small entities will attempt naturally to induce scarcity prices into the market price for balancing energy. This situation is different than is found in the U.S. power market outside of ERCOT where there is no such market power safe harbor and market monitoring actions may be aggressive enough

to preclude any entity from attempting to extract scarcity rents. Administratively inducing scarcity prices would amount to a subsidy like those that would be provided through capacity markets.

Joint Commenters, in its reply comments, expressed skepticism with ARM's assertion that the 5% market power safe harbor would permit sufficient scarcity pricing for the market because market participants would drive down the price towards short-run marginal costs unless there is true scarcity in the market, where scarcity is defined as involuntary load curtailment.

Commission response

The commission concludes that these comments are inconsistent with the actual experience in ERCOT markets. Prices in the balancing energy and capacity markets have reflected changes in supply and demand, and the relaxation of the existing pricing and bidding restrictions should result in prices that reflect the scarcity of resources. The commission also notes that the market has experienced high prices without a mechanism to administratively set prices during periods of scarcity. Furthermore, the nodal market protocols approved by this commission have such a mechanism, which incorporates administratively set high-priced energy offers into the real-time energy offer stack when ERCOT needs to deploy responsive reserve service in response to insufficient energy offers in the real-time market. As a result, the commission does not see the necessity of adopting additional measures to ensure scarcity pricing and declines to amend the rule as suggested by Joint Commenters and NRG.

NRG suggested that suppliers with larger market shares should have explicit safe-harbor bidding rules that protect them from the risk of mitigation while supporting bids significantly above incremental costs.

Commission response

New §25.504 allows generators to apply for a voluntary mitigation plan at the commission, which provides a generator with the chance to have a safe harbor. Once approved, the supplier would have an absolute defense against a finding of market power abuse with respect to the behaviors addressed in the plan, provided the supplier adheres to the approved mitigation plan. The commission believes that, at this time, the option to develop a mitigation plan for individual generator entities is preferable to developing a "one size fits all" plan that would be applicable to all generation entities. The commission may later choose to codify its decisions concerning voluntary mitigation plans once it has had more experience in determining the terms and conditions that are best suited to such plans. The commission therefore declines to adopt NRG's suggestion.

NRG suggested that smaller players and loads acting as resources (LaaRs) should have no mitigation or bidding limits at all. Joint Commenters also suggested that load resources should not be subject to any of the proposed offer caps or, alternatively, should be subject to much higher caps than proposed in the rule. In its reply comments, ARM opposed the NRG proposal. ARM stated that is it appropriate for the commission to limit the transfer of wealth to prevent the sustained receipt of monopoly rents. The commission's HCAP, annual PNM limit, and LCAP concepts together provide such protection and should be applied to all generation in the balancing energy market. Moreover, the scarcity pricing mechanism (SPM) is not designed as a market power mitigation mechanism. The SPM does not obviate the need for a market power rule. ARM urged the commission to reject NRG's proposal.

Commission response

The commission agrees with the points raised in ARM's reply to NRG. Until the demand response in the ERCOT market increases significantly, there will be a need for mechanisms to protect the public interest and prevent market power abuses and market manipulation. The mechanisms contained in the rule provide that protection and the commission sees no need to exclude load resources from their reach. The commission therefore rejects the suggestions from NRG and Joint Commenters that loads and smaller market players should not be subject to the offer caps in the rule.

TXU Cities opposed the adoption of the proposed offer caps. TXU Cities stated that the general concept of scarcity pricing doesn't make sense and that it does not believe that a single-price energy-only electricity market can promote economic efficiency, as Substantive Rule §25.501(a) requires, because the market prices may not always reflect short run marginal costs (SRMC). DME expressed concern that the proposed level of the offer cap was too high and would drive loads to engage in short-term contracting to avoid locking into high-priced long-term contracts that resources would offer them.

TXU Cities, in its reply comments, stated that the resource adequacy debate in ERCOT replicates similar debates that have occurred in other parts of the country and that, given that the fundamental resource adequacy issues confronting ERCOT are not unique, the commission should not try to reinvent the wheel. The commission needs to ensure the ERCOT market has a sufficient level of financial incentives to guarantee that investors will build an adequate amount of new generation capacity over time. TXU Cities, in its reply comments, stated that it believes that a competitive market provides efficient incentives for supply and demand. TXU Cities asserted that a single-price auction type is not a competitive market and that it does not provide efficient price signals and financial incentives. The arbitrary nature of the underlying basis for these bids, which sets the prices for all generation in the market, suggests that such prices could not possibly be economically efficient. Even if the market clearing prices were linked directly to costs, the fact that all generation entities dispatched at the same time are paid the same market clearing price sends false and inefficient price signals for the purpose of planning the transmission system.

Commission response

The commission rejects the proposition of TXU Cities that the single clearing price auction market in electricity produces neither competitive outcomes nor efficient price signals for market entry and exit. Such markets have been used for more than two centuries and many economists have agreed that such a market design is the benchmark for measuring the competitiveness of a market. The characteristics of electricity markets--lack of cost-effective storage, limited price-responsive demand, and severe transportation limitations--pose unique problems for electricity regulators. The overwhelming majority of electricity economists, however, expressed publicly that these problems do not undermine the market incentives embedded in a single-price competitive auction. The commission declines to adopt the changes proposed by TXU Cities.

TXU Cities expressed concern that there is no bright line between hours of the year when power is "scarce" and, therefore, deserves high prices well above marginal operating costs, and hours when power is not scarce and should be priced at marginal operating costs. TXU Cities stated that one of the major

problems with an energy-only electricity market is that neither a generation owner nor a market monitor can possibly know if each owner will cover its annual fixed costs for each of its generating units from the price it is paid in the market. Because the annualized fixed costs cannot be collected on a routine and dependable basis as the year goes by due to the inherently volatile spot market, the market can't be monitored for market power.

Commission response

The commission agrees that there are risks for both buyers and sellers in the ERCOT market. These risks are no greater than risks associated with other commodity and financial markets in the world today, market risks that market participants, both buyers and sellers, have been successfully managing for decades. The energy-only resource adequacy mechanism may require that market participants use different hedging tools than they would in a market with a different resource-adequacy mechanism, but it does not mean that market participants will be unable to manage risks in ERCOT. The commission disagrees with TXU Cities' contention that the market cannot be monitored for market power. The IMM will have the authority and resources to investigate any potential instances of market power abuse. Nothing in the rule prevents the commission from taking enforcement action against any market participant found to have engaged in market power abuse or other violations of PURA or the ERCOT Protocols. Further, the voluntary mitigation plans allowed by the rule will enable the commission and market participants to resolve potential market power abuses without the need for an enforcement action.

TXU Cities, in its reply comments, suggested that the commission set a required reserve margin for each load serving entity in Texas for a period of at least 3-4 years in order to meet its entire projected load plus an adequate reserve margin in each of those future years, with severe financial penalties if the reserve margin is not met. If the load serving entity did not contract for the capacity, then the LSE would be required to invest in and construct this new capacity. If the construction of new capacity was the least cost avenue for ratepayers, this approach would be naturally selected.

Commission response

TXU Cities' proposal is inconsistent with the competitive market established by PURA. PURA §31.002(17) specifically prohibits a retail electric provider (REP) from owning or operating generation. In contrast, the proposed rules are consistent with the legislative policy in PURA §39.001 that electric services and prices should be determined by competitive forces.

In its reply comments, TXU Cities quoted a paper by economists Peter Cramton and Steven Stoft (included by Reliant in its initial comments) in which the authors assert that "there cannot yet be a market for reliability" due, in part, to the lack of sufficient infrastructure investment in the transmissions system.

Commission response

TXU Cities' reliance upon the Cramton and Stoft paper is misplaced. That analysis was based on an assumption that necessary infrastructure for price-responsive demand would not be available for ten years. This assumption is unfounded. Certain large loads participate in ancillary services markets, and ERCOT is currently implementing protocol changes to gain greater participation from LaaRs. Additionally, the commission has initiated Project Number 32853 to address various demand response issues--such as expanding the percentage of large loads covered by interval data recording meters (IDRs)--in order to further encourage the development of opportunities for demand participation in the ERCOT markets. A separate project is considering issues related to advanced metering, which should give customers access to more discrete information on their consumption and could result in time-of-use pricing for customers for whom it is not now an option.

TXU Cities stated that it is impossible to eliminate the boom-bust investment cycles and lower regulatory risk to acceptable levels if an energy-only balancing market is solely relied upon to provide the proper price signals to ensure resource adequacy. Prices are either extremely high or extremely low.

Commission response

The commission agrees that even under proposed resource-adequacy mechanism, ERCOT may experience a boom-and-bust resource investment cycle. Demand-side response can act as a shock absorber in any boom-and-bust investment cycles, where certain loads will curtail more often in years of shortages than years of plenty. ERCOT has policies that allow new resources to quickly and easily enter the market. Price-responsive demand will curb some instance of high prices. Additionally, loads have the ability to arrange multiple-year contracts, which can protect loads from high spot market prices in years with lean reserve margins. While these aspects of the ERCOT market do not eliminate a possible boom-and-bust cycle, they mitigate its impact. In any event, the possibility of such a cycle does not justify the conclusion that the balancing market under an energy-only resource adequacy mechanism will not provide proper price signals to ensure resource adequacy. Moreover, it is not clear that other mechanisms for ensuring resource adequacy are effective, much less capable of avoiding boom-and-bust cycles.

TXU Cities proposed that a potentially competitive market structure would be similar to the type of wholesale auction held in New Jersey where bids are solicited for a percentage of the load of a given distribution utility. In this case, bidders would need to put together a least cost package of baseload, cycling, and peaking capacity and energy when creating their bids. In general, the most economical use of generation resources occurs when the sum of all variable and fixed costs for generation meeting load is minimized over the long run.

TXU Cities, in its reply comments, stated that the use of bid price caps does not adequately protect retail customers from the presence of market power in an energy-only market. Adjusting the numerical values of such price caps up or down administratively as circumstances in the market change is just another form of rate regulation, albeit a weak and uncertain form that does not ensure that retail consumers are protected from the existence of market power.

CPS Energy, in its reply comments, stated that TXU Cities' suggestion that the ERCOT wholesale market be totally reformed to implement a pay-as-bid approach was flawed, going so far as to suggest that the bid part of the equation be set at cost plus a reasonable profit. The inefficiencies and problems associated with a pay-as-bid approach are well-documented in academic literature. CPS Energy noted that the second part of the proposal--to implement a form of cost-based pricing--sounds much like regulation. This approach is in violation of PURA and even worse than regulation, because it would lead to resource inadequacy. CPS Energy recommended that the commission reject all of TXU Cities' proposed changes.

Reliant, in its reply comments, disagreed with TXU Cities' recommendation to scrap the existing market structure in favor of "NJ-style" auctions whereby bids are solicited for a percentage of load of a given distribution utility. Reliant noted that this market structure is not permitted by law, and would abandon the most successful retail market in the country in favor of a less successful pseudo-competition model.

Commission response

The commission agrees with CPS Energy and Reliant that the TXU Cities' approach is flawed, would introduce inefficiencies and problems into the ERCOT market, would undermine a successful retail market and is in violation of the legislative policy supporting the development of a fully competitive electric power industry. The commission therefore declines to make the changes suggested by TXU Cities.

TEC stated that raising offer caps discriminates against smaller QSEs and will allow firms with market power to increase the rents they can extract from the market. TEC stated the appropriate length of and intensity of "scarcity pricing" allowed in ERCOT should be zero. It claimed that concerns over the ability of currently installed super-peaking capacity to recover its capital costs under the present cap reflect a plea to justify continued use of uneconomical assets.

TEC stated that the current level of the offer caps should not significantly impact future peaking projects and capacity expansions, because such assets are not constructed contingent on prices in the balancing energy market. TEC believed that continued load growth in ERCOT, reliance on an ever-aging generation fleet, and continued uncertainty about coal transport and high gas prices may drive reserve margins down to 10% at the end of the decade.

TEC stated that the appropriate level of HCAP that would strongly encourage bilateral contracts is infinity. TEC expressed concern that while real-time energy prices in Australia are low, no analysis has been made to determine how much prices were raised in the Australian bilateral energy market. TEC suggested that bilateral contracts in Australia pay a premium to cover concerns over high spot market prices, providing an unnecessary windfall to sellers.

Commission response

The commission concludes that scarcity pricing is an appropriate tool for maintaining adequate reserves in a competitive market. Contrary to TEC's assertions, existing peaking capacity is uneconomical only if more economical alternatives are available to meet demand during the superpeak hours of the year. This rule is intended to encourage the development of such alternatives by providing incentives for the development of *new* peaking capacity. While it is true that a new peaker's profitability is not necessarily a function of what it gets paid for balancing energy, market expectations for the MCPE do influence the expected bilateral contract prices upon which investment decisions are made. The protection of a stable bilateral contract will become more valuable to load-serving entities as price risk increases in the balancing energy market. This does not constitute an unnecessary windfall to sellers. In the commission's view, it is simply a risk premium, similar to what arises in every competitive market where uncertainty is a factor. Adoption of TEC's proposal would inhibit the development of new peaking capacity and actually prolong ERCOT's reliance upon older, less efficient peaking units.

TEC stated that participation in demand-side management programs is unlikely to be impacted by the value of HCAP. Given that most consumers have an inelastic demand for firm electricity service, customers' billing statements will not correlate peak usage to average prices paid for electricity and most current metering devices will not support demand-side management (DSM). Reliant, in its reply comments, agreed with TEC's position.

Commission response

The commission agrees that the price elasticity of demand is limited by the lack of interval metering for many loads and plans to address this shortcoming in Project Nos. 31418 and 32853. In Project Number 32853, the commission will consider such proposals as expanding the number of large loads that use IDR meters to settle those loads using real-time consumption rather than load profiles. Project Number 31418 will consider requiring features on advanced meters for residential and other small loads to provide retailers with more accurate electricity usage than monthly billings and average load profiles. To reduce the impediments to market-based demand-side response in ERCOT-procured markets, the commission also will consider accelerating the implementation of certain protocol revision requests (PRRs). There is some level of interval metering that is used for wholesale settlement and retail pricing today, and these changes will improve load response to the MCPE over time. The commission sees no need to change the rule in response to the comments of TEC and Reliant.

TEC proposed to use a mechanism for recovery of costs for super-peak assets in the marketplace that has been approved for the California market. This solution would replace the "hard" offer caps currently in place at $1,000 per MWh with a "soft" cap at a lower level designed to limit consumer exposure to price spikes. Unlike a "hard" cap, sellers are allowed to bid resources into the market at prices above the "soft" cap; however, if sold, those resources will have no impact on the prices of other power sold in the market.

TEC stated that the "soft cap" methodology has three advantages. First, consumers that enter the balancing energy market would be partially insulated from price spikes resulting from scarcity conditions and abusive market behavior. Second, firms seeking to recover costs of "super-peaking" units can charge whatever price the market will bear for those specific resources without impacting the prices paid for resources purchased at or under the cap. Third, the long-term market signals required to encourage the construction of additional capacity will remain intact, as the room under the soft cap will allow resource providers to garner prices significantly above those needed to support efficient units.

Good Company stated that between 2002 and 2004, ERCOT experienced only 30 hours in which prices in the balancing energy market exceeded $300. Prices should be allowed to rise sufficiently to finance new generation and encourage responses by consumers to the risk of exposure to higher prices.

ARM replied that TEC's proposal was flawed. Entities that control generation in excess of the 5% installed capacity market power safe harbor might be unable to bid in excess of short-run margin costs due to market monitoring concerns. TEC's soft cap would unduly deny these entities the ability to earn scarcity rents, since the market price for balancing energy would not be allowed to reflect scarcity. Because TEC's soft cap would prevent the market price for balancing energy from reflecting scarcity, the incentive provided by higher price caps for long-term forward

contracting by load serving entities would be eliminated under TEC's proposal. CPS Energy, in its reply comments, stated that the TEC soft cap was a pay-as-bid approach for all accepted offers greater than the soft cap, with the payments to be uplifted. CPS Energy strongly opposed the soft cap mechanism, because it is entirely inconsistent with the fundamental principles underlying competitive wholesale markets, especially in an energy-only market.

TEC, in its reply comments, stated that ARM used faulty logic to support the proposed HCAP. According to TEC, what ARM ignored was that no profit-maximizing firm would ever invest money in a generation resource solely contingent upon that resource being profitable in the balancing energy market. TEC also stated that absent a defined load for the resource coupled with a bilateral agreement designed to cover capacity charges, it is highly unlikely that raising the offer caps will do anything other than place consumers and small generators at grave market risk. TEC stated that the proposed rule, with the phased-in HCAP, would distort the goal of ensuring future resource adequacy to further the economic interests of large generators with existing capacity.

Commission response

The commission agrees with the reply comments of ARM and CPS Energy regarding TEC's soft cap proposal. The commission believes TEC's approach is inconsistent with the fundamental principles of competitive wholesale markets and is inconsistent with an energy-only resource adequacy mechanism. The commission agrees with Good Company that prices should be allowed to rise sufficiently to encourage new generation. Therefore, the commission declines to amend the rule to incorporate TEC's suggested revisions.

CPS Energy and TXU Wholesale expressed concern that the proposed offer cap of $3,000 per MWh was too low for the energy-only mechanism to be successful. CPS Energy noted that the Australian market has been successful because the offer cap is currently at the equivalent of $7,500 per MWh. CPS Energy stated its belief that the value of lost load (VOLL) in ERCOT is higher than $3,000 per MWh, and that, in the long run, the offer cap has to be equal to VOLL to avoid involuntary curtailments during summer peak. TXU Wholesale suggested starting with a $6,000 per MWh offer cap in March 2007 and gradually raising the cap to $10,000 per MWh in 2009. In its view, VOLL for Texas customers is in the $6,000 to $10,000 per MWh range. Therefore, HCAP should be set at that level.

CPS Energy stated that if capacity additions are required and market prices are insufficient to support the investment, additional generation is not likely to be built. CPS Energy believed that the commission should demonstrate confidence to the industry and the investment community regarding its commitment to an energy-only market by implementing the full level of the offer cap on September 1, 2006. ARM replied that the final HCAP does not need to be phased in any faster than the commission proposed because resource adequacy appears to be sufficient until 2010.

TXU Wholesale opined that the proposed scarcity pricing mechanism (SPM) just expands regulation by imposing lower price caps on the entire market, thereby endangering the commission's goal of ensuring resource adequacy. TXU Wholesale and Joint Commenters also asserted that the HCAP is too low to ensure sufficient bilateral contracting to meet the commission's resource adequacy goals. Joint Commenters contended that the proposed rule will not produce sufficient demand-side response and that the demand bids should not be capped or should have very high caps.

ARM suggested that the final HCAP to be phased in by March 1, 2009 be $6,000 per MWh, to ensure that the annual PNM limit can be reached without involuntary load curtailment. ARM opined that the projected reserve margins through 2010 show that resource adequacy likely will be more than sufficient through 2009. ARM believed that the transition to the HCAP should be completed by March 2009, based on the past boom of generation building and the recently announced coal and wind projects that are driven by projected infra-marginal profit opportunities. ARM asserted that these fundamentals are only transitory in nature. In the event that the commission decides to retain the $150,000 per MW PNM limit, then the commission should adopt an offer cap of $5,000 per MWh instead of $6,000 per MWh.

Joint Commenters, in comparing the load duration curves of the Australian and ERCOT markets, drew the conclusion that the offer cap in ERCOT should be higher than the offer cap of $A10,000 in the Australian market. Joint Commenters also said that the caps would rarely be reached, given certain provisions in Substantive Rules §25.504 and §25.505.

Joint Commenters also contended that the offer cap is too low to meet the one-day-in-ten-years loss of load probability (LOLP) standard, citing several studies. Joint Commenters and NRG proposed to raise the cap or eliminate the offer cap for load resources as a way to ensure resource adequacy through scarcity pricing.

Joint Commenters were concerned that the commission will impose substantial bid caps and other obstacles to adequate revenue recovery, resulting in resource shortages. Much of the announced generation is never built, and the existing generation fleet in ERCOT is old. Joint Commenters, in their reply comments, noted that Dr. Baldick stated that much of this older capacity is likely to be decommissioned.

ARM stated that setting the HCAP too low would not allow some resources with low capacity factors to earn sufficient revenues in the market and might require involuntary curtailments of load. ARM assumed that scarcity pricing would generally occur when load levels reached at least 95% of peak load, when entities granted the safe harbor provision in the market power rule would be pivotal in the balancing energy market. With a $1,000/MWh offer cap and only 30 hours of significant scarcity pricing, for instance, the PNM would be only $27,600/MW per year, not sufficient to provide a competitive investment opportunity for generation developers. The commission's proposed $3,000 offer cap would permit a maximum recovery of $87,000/MW per year.

ARM proposed an HCAP of $5,000 to 6,000 to allow resources the opportunity to recover fixed costs under the assumption of 30 hours of scarcity pricing per year. These higher levels would encourage forward contracting and maximize demand-side participation. Maximum demand-side participation occurs when scarcity premiums are concentrated into the smallest number of hours possible.

ARM, in its reply comments, agreed that the proposed HCAP value of $3,000 per MWh is not sufficient due to the infrequent occurrence of scarcity conditions. ARM did not agree with CPS Energy, however, that the HCAP needs to be set at VOLL. Instead, ARM stated that the annual PNM limit can be realized without involuntary load curtailments. Moreover, the annual PNM limit should be set to a value that presents a revenue op-

portunity that is sufficient to make investments in a new peaking generation facility competitive compared to other investment opportunities.

In its reply comments, OPC opposed the changes in the HCAP that ARM proposed. OPC believed that an HCAP greater than $1,000 per MWh would strongly encourage forward contracting. OPC stated its preference for longer hours at a lower cap. OPC stated its belief that the principal barrier to demand-side participation in both the current zonal and future nodal market design would be difficulties in synchronizing the market with demand-side response rather than the level of the HCAP.

LCRA stated that the proposed HCAP levels are more than sufficient to serve their intended purpose.

Reliant suggested that the commission delete subsection (i), that this mechanism is not a true energy-only mechanism, and that debating the level of offer cap has little or no meaning. Reliant and STEC proposed that the commission retain the $1,000 per MWh offer cap until there is a study that clearly demonstrates that what has been used for the past five years doesn't work and what the potential for demand-side response will be in ERCOT. STEC urged the commission to leave the offer cap at $1,000 per MWh until it investigates further if the discrepancy between the high and low reserve margin caused by the mothballing of units is reasonable and justified.

ARM replied that without involuntary curtailments, an offer cap of $1,000 per MWh will not provide a sufficient investment opportunity for new generation development for resource adequacy and to attempt this empirically would require the commission to risk market failure and its associated resource inadequacy.

STEC replied that although TXU Wholesale and Joint Commenters have presented plausible arguments with respect to the level of the system-wide offer cap, STEC believed that Reliant has provided compelling reasons for leaving the current offer cap in place until the issue has been properly studied. STEC believed that the offer cap might be sufficient, and that this argument was given more credence in light of the recent announcements of plans to build new generation plants in ERCOT.

Commission response

The commission agrees with comments that maintaining the current offer cap of $1,000 per MWh would have deleterious effects on the ERCOT market. Without raising the offer cap to higher levels, the owners of generation and load resources will not have sufficient incentives to be available when additional supply is needed. Under an energy-only resource adequacy mechanism, ERCOT cannot rely on a daily "must-offer" requirement or capacity payments to ensure that sufficient resources are available in those situations. A higher offer cap will provide strong incentives for investment in quick-start generation and load response to meet demand in unusual market situations. Additionally, the commission believes that a $1,000 per MWh offer cap would require market participants to lean too heavily on load resources and existing generation to meet peak demand. While a $1,000 offer cap should provide sufficient incentives for market participants to build and to contract for new baseload, intermediate, and intermittent renewable generation, there is some evidence in other electricity markets that a $1,000 per MWh offer cap might not provide incentives for sufficient new peaking generation to enter the ERCOT market. Therefore, the commission declines to amend the rule to set the HCAP at $1,000 per MWh or lower as recommended by STEC, Reliant, and others.

The commission agrees that the average level of VOLL is higher than the $1,000 per MWh offer cap that is currently in effect in ERCOT. That fact also supports the commission's decision to increase the offer cap in this rule, but it does not mean that the offer caps should be raised to the same level as in the Australian market. As discussed previously, there are important differences between the ERCOT market and the Australian market and the commission does not need to raise the offer cap to Australian levels in order to assure resource adequacy in ERCOT. Additionally, the value of lost load is different for different customers, and the higher caps being adopted in this rule should provide additional incentives for customers to adjust their consumption in response to high prices. The commission and market participants are also taking steps to remove impediments to market-based demand response. The implementation of these new steps, including advanced metering and expanded time of use pricing, will increase the level of price-responsive load in ERCOT. This will enable the offer caps to remain lower than Australian levels. Given the prospect for increased levels of load participation in the ERCOT market and assuming that a sizeable amount of the new baseload generation recently announced by TXU Wholesale, CPS Energy, and others will come online in ERCOT by 2010, the commission does not find compelling evidence that ERCOT requires an offer cap at Australian levels. Therefore, the commission declines to raise the HCAP to $7,500 per MWh or higher as suggested by various commenters.

The commission has decided to phase in the increase in the HCAP over a three-year period rather than immediately for the following reasons. First, the commission notes that a number of features of this rule, such as the statement of opportunities (SOO) and the PASA, are based on the assumption that developers need three years to install new gas-fired generation in ERCOT. Therefore, the offer cap that will exist two to three years in the future, not the prevailing offer cap, is the relevant offer cap for investors making decisions on whether to build new generation in ERCOT.

Second, the commission believes that the market will need some time to increase load participation in ERCOT significantly. The commission agrees with the comments that the energy-only resource adequacy mechanism will work more effectively when a wider and deeper range of load response is available in the market. However, increasing the participation by price-responsive load may not result solely from higher price caps, and commission action to remove the impediments that currently exist in ERCOT may be important. The commission plans to increase the amount of price-responsive load in ERCOT. The IMM can play an important role in helping the commission assess the progress of the energy-only resource adequacy mechanism. The commission will have sufficient opportunity to consider a different HCAP if the level of new generation investment and price-responsive load is not sufficient at the $3,000 per MWh offer cap.

Third, the commission has reviewed ERCOT's projections of the planning reserve margin for the next few years and agrees with ARM that the projected reserve margins in ERCOT allow the commission to gradually raise the level of the HCAP over a period of three years. The commission also believes that the termination of MCSM and the gradual rise in the offer cap in the amended language in this rule should provide sufficient incentive to keep enough existing peaking resources online to meet projected summer peak demand during the three-year phase-in period.

For the reasons stated above, the commission disagrees with the assertion of CPS Energy and others that the full offer cap should be instituted as soon as possible. The commission has determined that raising the offer cap in one step by the end of this year would cause an unnecessary transfer of wealth from loads to generation without increasing installed generation or demand response in ERCOT. The commission can avoid this wealth transfer and achieve the incentive objective of the scarcity pricing mechanism by increasing the HCAP over a period of three years that roughly corresponds to the time period needed for development of new peaking generation and is well beyond the time needed for implementation of new demand-response programs. Accordingly, the commission declines to amend the rule as requested.

5. Timing of the Annual Resource Adequacy Cycle. The commission seeks comment on the start date of the Annual Resource Adequacy Cycle. Proposed §25.505 has the start date as January 1 of each year. Other start dates the commission is considering are October 1, March 1, and May 1. Another alternative being considered is to enforce the low system-wide offer cap whenever the Peaker Net Margin for the previous 365 days is equal to or greater than $150,000 per megawatt and reinstate the high system-wide offer cap when the Peaker Net Margin for the previous 365 days drops below $75,000 per megawatt. Please state your preference for the start date and the reason for your preference. In particular, the commission seeks comments on the impact of the start date on the level and timing of scarcity pricing in the summer months and resource availability during extreme weather events in the winter months.

Reliant and STEC believed that the commission should not use an annual resource adequacy cycle. Joint Commenters and NRG believed that the entire approach is unworkable and should be replaced with a four-year cycle with a Peaker Net Margin of $350,000 per MW. Joint Commenters and NRG believe that the proposed rule's mechanism would not ensure adequate capital recovery, and LSEs would have no incentive to hedge.

TXU Wholesale suggested using a 365-day rolling basis and suggested language to implement such an approach. According to TXU Wholesale, the rolling-basis would avoid the potential for artificially imposed price oscillations at the start of a new calendar year and would allow for some smoothing so that generation entities can account for the substantial operational uncertainties faced by peakers in the timing of their revenues and profits, because a peaker can go for a substantial time without operating. With regard to the commission's alternative proposal for rolling annual HCAP and LCAP system-wide price caps, there is no economic analysis to support the price levels it has chosen that trigger the cycle between HCAP and LCAP. TXU Wholesale also suggested a change in the threshold to shift the offer cap from HCAP to LCAP. TXU Wholesale stated that the price level that triggers the shift between the LCAP and HCAP should be based on realistic peaker costs, and that the price level that reinstates HCAP on a rolling basis should be increased from $75,000 per MW to $85,000 per MW. ARM replied to TXU Wholesale's proposal by stating that the commission should reject it.

TEC supported an October 1 start date for the Annual Resource Adequacy Cycle, as this date would capture the most recent summer peak for all utilities, while additionally measuring the last full winter of historical record. Austin Energy recommended that resource adequacy be taken up in the summer or fall outside the peak season to give ERCOT a better view of the reserve margin closer to the peak. ARM believed that an October 1 start date would risk exhausting the HCAP envelope before the next summer peak.

CenterPoint recommended that May 1 be used as the start of the Annual Resource Adequacy Cycle, as this date would align the SPM with the summer months and avoid the situation where the LCAP might be triggered during the summer peaking months. CenterPoint believed that the May 1 date would also promote system reliability by encouraging generation to remain on-line during the summer high demand periods. ARM stated that a start date of March 1 or May 1 would risk exhausting the HCAP envelope prior to the months of January and February when the combination of cold weather fronts and plant maintenance outages can create transitory supply-demand imbalances that would precipitate high market prices for balancing energy.

ARM supported the proposed January 1 start date for the annual resource adequacy cycle. The start date would ensure that there would be ample dollars in the HCAP envelope to cover any unusual events from January and February cold fronts that reach Texas while leaving sufficient room in the envelope to provide the required HCAP price signals during the critical summer months.

ERCOT suggested that a start date of May 1 for the Annual Resource Adequacy Cycle due to the number of end-of-year reports and other year-end activities ERCOT must already complete early in the year. ERCOT would be able to incorporate data relating to the cycle in its annual Capacity, Demand, and Reserves (CDR) Report it produces in May of each year.

Commission response

The resource adequacy rule seeks to balance two competing concerns: providing generation and load resources a reasonable opportunity to cover their fixed costs over time and protecting load from excessive transfers of wealth to generators during periods of low reserve margins. Sustained high prices, or the potential for sustained high prices, are intended to serve as a signal that more generation is needed in ERCOT or within a region of ERCOT. However, because the vast majority of loads currently have a very limited ability to see and respond to price signals in ERCOT spot markets in the short run, they do not have the ability to protect themselves from the high prices that may occur. The annual resource adequacy mechanism is intended to protect loads from persistent high prices, while providing sufficient high-price signals to entice new generation into the market.

The commission recognizes that some peaking resources need the opportunity to recover more than an annualized average of fixed costs in a given year because peakers will have limited opportunities to earn scarcity prices in years when reserve margins are large. The rule, as amended, has set the PNM to allow more than twice the annualized fixed costs of a new gas-fired peaking unit, and the offer cap is set high enough to allow new gas-fired peaking generation to meet superpeak load. These provisions, along with the elimination of MCSM, provide a greater opportunity for cost recovery than exists under the current $1,000 offer cap. The commission is setting the LCAP at a high enough level to allow additional fixed cost recovery during the years when the reserve margin is thin. Taken as a whole, the rule provides generators with an opportunity to earn a reasonable return on their investment.

The four-year approach by advocated by Joint Commenters and NRG would lead to excessive transfers of wealth from load to generators during years of low reserve margins by significantly increasing the total amount that can be collected before the protection provided by the LCAP is initiated. This approach provides

additional benefits to generators but undermines the commission's other goal of protecting customers from excessive wealth transfers. The commission believes that the resource adequacy cycle as amended provides the best balance between enhancing the opportunity for resources to recover their costs for new peaking generation and protecting loads from excessively high prices for extended periods.

The commission agrees with ARM's reasons for keeping the start date for the annual resource adequacy cycle as January 1 and declines to change the date in the rule as suggested by TEC, CenterPoint, and Austin Energy. The commission believes that having the offer cap set at HCAP during the first half of each year is important to help ERCOT assure sufficient availability during the winter heating season and the spring "shoulder" season when many plants are scheduled for planned maintenance. Since the opening of the wholesale market in 2001, ERCOT has experienced a number of days during these seasons when demand approached, or even exceeded, available supply. The commission believes that having a high offer cap during these seasons is critical to allowing the market to maintain sufficient supply through the pricing mechanism. The possibility of high prices in the ERCOT-real-time market provides generation with strong incentives to be available on short notice. It also provides load with strong incentives to voluntarily curtail on short notice to save money. These markets signals impact supply since generators have a great deal of discretion in scheduling planned outages at ERCOT.

The commission notes that the start date of the resource adequacy cycle simply resets the PNM and has no other impact on the ERCOT workload or reporting requirements. The timing of the annual resource adequacy cycle should be set with consideration of the impacts on the market and resource adequacy. In this situation, ERCOT administrative requirements are a secondary consideration. The commission therefore declines to amend the rule as suggested by ERCOT.

The commission also declines to amend the rule as suggested by TXU Wholesale because it would add unnecessary complexity to the determination of what cap is in effect. Further, under TXU Wholesale's proposal, in certain years the LCAP has a non-trivial chance of being the prevailing offer cap during the first half of that year and would not address the concerns with the winter and spring seasons noted above.

6. Resource Adequacy Backstop. The commission seeks comment from ERCOT and other parties on the circumstances and timing of events that may trigger the implementation of the procedures in §25.505(j), as well as other possible resource adequacy backstop mechanisms than the one described in §25.505(j). Please describe any alternative in detail, provide the rationale for preferring the alternative approach, and provide rule language that the commission could use to implement the alternative.

Nucor suggested that the ELR program should be implemented now and should be considered an integral and ongoing part of the ERCOT system. CenterPoint supported the ELR program to the extent that it is implemented within the criteria established by the ERCOT Generation Adequacy Working Group in 2005. The criteria include participating loads' availability at system peak and measurement and verification of deployments. Joint Commenters stated that if the ELR is adopted, the market power rule should be revised to apply to load resources as well as generation resources.

TIEC stated that the commission should be cautious when implementing any program that is outside the normal market structures. ELR contracts have this character, and in many ways resemble reliability must run (RMR) contracts. New RMR contracts trigger an exit strategy analysis to determine whether there is a cost-effective option to eliminate the non-market contract. TIEC believed that this type of safeguard should be applied in the ELR context. Reliant, in its reply comments, agreed.

TXU Wholesale stated that the backstop mechanism should be a last alternative mechanism in an energy-only market so that scarcity signals created by higher prices and a lower reserve margin are not dampened. In order to preempt ERCOT from procuring these options contracts with load when there is still sufficient capacity in the market, the commission should add a provision requiring ERCOT to enter into emergency load response contracts only when its Medium-Term PASA predicts a reserve margin in the third year of less than 5%.

LCRA and ARM supported the use of ELR contracts as a backstop to ensure reliability under an energy-only resource adequacy mechanism.

ARM replied that it is prudent to retain the proposed ELR backstop mechanism in the resource adequacy rule, provided it is limited in scope and duration and does not become a substitute for the normal operation of the competitive energy market. ARM stated that having a backstop mechanism in the rule to provide customers with an assurance that the commission will act to preserve system reliability under extraordinary circumstances is reasonable. If the ELR contracts are deployed only during system reliability emergencies and not used to mitigate high prices, and the duration of such contracts is capped at one year, ARM continued, the limited scope of the resulting market intervention is unlikely to interfere with true scarcity pricing. ARM and LCRA recommended that ELR contracts either be designed with a strike price equivalent to the HCAP, or have the commission require that the contracts operate as price takers in the ERCOT energy market.

ERCOT, in its reply comments, stated that given that ERCOT instituted its Emergency Electric Curtailment Plan (EECP) on April 17, 2006, and was forced to instruct firm load curtailments for the first time in more than sixteen years, ERCOT sees great value in having access to a voluntary and compensated last line of defense against rotating outages. ERCOT requested that the commission provide the following clarifications in the final rule language.

* Clearly instruct ERCOT stakeholders to complete development of the program and submit it to the ERCOT Board for approval by a date certain. ERCOT suggest a deadline of one year from the effective date of the adopted rule.

* Empower ERCOT to develop and maintain, as part of the ERCOT Protocols, the methodology for triggering the issuance of ELR contract requests for proposal.

ARM and ERCOT suggested that the subsection should define the criteria for the use of the PASA as a benchmark for ELR contracts. ARM proposed that a need for ELR contracts would be established when the medium-term PASA shows for three consecutive months that an ERCOT transmission zone will experience a shortfall in capacity resources for a future delivery period. The backstop mechanism would apply only to the portions of the grid where there is evidence of a persistent supply shortfall. ARM also suggested that the rule should clarify that the commission would make the decision to implement ELR contracts.

ERCOT suggested that the decision be based on the results of a LOLP analysis. ERCOT suggested that for purposes of ELR contracting, if an LOLP study showed a greater than one-in-ten-years chance of a supply shortage for the upcoming year, then ERCOT would initiate the ELR program to acquire sufficient resources to reduce the LOLP to at or below the once-in-ten-years level.

ARM replied that it does not oppose the proposed use of an LOLP analysis to trigger the initiation of the ELR backstop mechanism, provided that the forecasted time horizon is limited to one year. To ensure success of the energy-only market, it is critical that the backstop mechanism be deployed only when it is clear that scarcity prices have not elicited adequate resource additions from the market. Any time horizon for the LOLP analysis in excess of one year would result in premature and excessive ERCOT intervention in the energy-only market and would not give market participants adequate time to respond to anticipated capacity shortages with their own resource additions prior to the initiation of the ELR program.

CPS Energy, in its reply comments, noted that one critical component of any LOLP analysis is the projection of firm demand. In an energy-only market, firm demand is the demand that is unwilling or incapable of curtailing prices up to the applicable offer cap. CPS Energy questioned the ability of anyone, including ERCOT, to produce an accurate forecast of firm demand in this context at this stage in the development of the competitive wholesale market. CPS Energy and NRG stated that ERCOT is more likely to over-estimate than under-estimate firm demand and would unnecessarily procure ELR contracts. CPS Energy also argued that there would be many uncertainties that will challenge ERCOT's ability to produce an accurate forecast of supply, such as future status of mothballed capacity, DC ties, switchable energy, wind capacity, and new capacity.

Reliant, Joint Commenters, and NRG stated that the ELR should not be adopted. Joint Commenters suggested eliminating the ELR provisions of the proposed rule, as they believed that it would pose severe risks to the objectives of an energy-only market yet would not ensure reliability. Joint Commenters deemed capacity payments to load "unfair" to generators, who compete with LaaRs, and was the wrong way to encourage load participation. In reply comments, Joint Commenters expressed concern that the proposed ELR provisions did not establish standards, contract terms and conditions that would require careful public scrutiny.

NRG stated that the ELR proposal would add another level of regulatory uncertainty, would provide load with a capacity payment, and would further mitigate the market in a way that would reduce investment in new generation.

Reliant proposed that if the reserve margin, as projected in the medium-term PASA, falls below the 112.5% threshold, the commission should initiate a proceeding to determine whether expected demand response will be sufficient to address resource needs by the beginning of the fourth year. If the commission determines that an appropriate level of demand response cannot be present within four years, then the commission should implement Reliant's proposed capacity-and-energy mechanism to ensure resource adequacy.

In its reply comments, ARM strongly opposed Reliant's proposal, and recommended that the commission reject it and preserve the ELR contract backstop mechanism. ARM opined that Reliant's recommendation, in conjunction with its proposal to preserve the existing $1,000 per MWh system-wide offer cap, is a backdoor and thinly veiled attempt to force the commission to adopt an installed-capacity market for ERCOT, which the commission considered and rejected last year in favor of an energy-only resource adequacy mechanism. ARM stated that if resource adequacy has not been adequately addressed under the energy-only market it adopts in this rulemaking proceeding, then the commission should retain the flexibility to consider a broad range of options to remedy any shortcomings. ARM stated that there is no legitimate reason to restrict the commission's flexibility on this important issue by requiring it do default to an ICAP market design that the commission already has rejected.

In its reply comments, CPS Energy proposed as an alternative to ELR contracts what it calls the Market-Based Emergency Load Response program (MBELR). Under the proposal, ERCOT would solicit commitments from loads to provide standing offers during the peak hours of the coming year at increasing levels, with the possibility of raising the offer cap to $10,000 per MWh. ERCOT could stratify the quantities solicited at each successive pricing level by applying varying levels of maximum number hours of curtailment per year associated with the commitment.

In their reply comments, Joint Commenters stated that the ELR can only work if it is essentially indistinguishable from price responsive demand in that it does not receive a capacity payment and could set the market-wide clearing price. Joint Commenters provided two alternatives.

* Providing load resources a higher bid cap than generation resources and allowing load resources, if curtailed, to clear the market.

* Integrating reserve scarcity into energy prices through an administratively set demand curve for reserves. Under a zonal market, the real-time cap should be raised to VOLL during any day when there is ancillary service deficiency.

Occidental suggested that the commission a provision to require that ELR be based on the technical reliability needs of the ERCOT system in the most cost-effective manner and be non-discriminatory with respect to any load resources.

TXU Wholesale stated that the backstop mechanism should be a last alternative mechanism in an energy-only market so that scarcity signals created by higher prices and a lower reserve margin are not dampened. In order to preempt ERCOT from being overly conservative in procuring these options contracts when there is sufficient capacity in the market, the commission should add a provision requiring ERCOT to enter into emergency load response contracts only when its Medium-Term PASA predicts a reserve margin in the third year of less than 5%.

Nucor, in its reply comments, stated that the rolling blackouts in April underscore the need for an ELR program. It said that the 5% reserve margin standard suggested by TXU Wholesale to trigger the institution of an ELR program would court potential disaster unnecessarily. Nucor also noted Reliant's proposal that the commission institute a proceeding to determine a response when presented with PASA data forecasting a small reserve margin four years distant, opining that it would complicate the implementation of the ELR concept. Nucor, in its reply comments, recommended that the commission reject both ideas.

ERCOT stated that the ELR program seems unlikely to match up well with mass market participants or aggregated loads--the currently untapped segments of the ERCOT market for load participation. ERCOT stated that mass market or aggregated loads

tend to have lower load factors, with peak usage more closely aligned with system peaks than industrial loads.

Comverge stated that the current rules in ERCOT do not facilitate or adequately address the participation of residential and small commercial customers in the resource markets. Comverge stated that the most successful demand response programs for residential and small commercial customers are direct load control (DLC) programs. Comverge posited that a fully out-sourced demand response program can be structured as a power purchase agreement and that the proposed rule should be structured to encourage REPs to enter into these programs. Because such DLC programs are capital intensive, the provider of the program needs to enter into long-term agreements with REPs with a minimum ten-year term. Comverge suggested that as part of the ten-year studies under the SOO, ERCOT should enter into ELR contracts with providers of residential and small commercial demand response programs for a term of no shorter than ten years.

Reliant, in its reply comments, stated that Comverge's proposals would be extremely invasive on REPs and their contracts with retail customers, and even worse, the proposal for ERCOT to contract directly with customers puts ERCOT into a role that properly belongs to REPs. Reliant stated that such regulatory mandates should be rejected.

ARM replied that the commission should reject proposals to extend the term of ELR contracts beyond one year. ARM stated that the goal of an energy-only resource adequacy mechanism should be to encourage voluntary demand-response and generation resource additions through market-based signals, and therefore the scope of the ELR contract should be limited.

ERCOT noted that depending on how the ELR program is designed, loads may find it more desirable to migrate from voluntary load response to the ELR. ERCOT asked the commission to consider whether an unintended consequence of the ELR program could be an increase in uplifted costs to market participants and a decrease in non-emergency-related price responsive load.

LCRA stated that an important feature of ELR contracts is the offering of ELR resources at the system-wide offer cap. The offering of ELR resources at the system-wide offer cap is important because it would ensure that ERCOT's procurement and deployment of ERCOT resources would not distort the scarcity pricing signal the market needs during that critical period and that ERCOT does not use ELR contracts to lower prices in ERCOT spot markets. Reliant, in its reply comments, agreed with LCRA's concern about having the ELR suppress scarcity pricing.

Austin Energy said that ELR costs should be directly assigned to the market participants who require load response. CPS Energy, in its reply comments, agreed. Austin Energy said it maintains a 12.5% reserve margin in serving its own load and therefore should not be paying for additional resource adequacy costs in the form of ELR. STEC, in its reply comments, concurred. ARM suggested allocating ELR contract costs on a zonal load ratio share basis and exempting a QSE from the uplift of ELR contract costs if the QSE has sufficient resources or purchased power contracts to cover its zonal load obligations. ARM posited that this allocation method would create strong incentives for load-serving entities to execute bilateral forward contracts to cover their load requirements, which is vital to support the construction of new generation resources and to ensure the success of an energy-only resource adequacy mechanism.

Nucor, in its reply, disagreed with Austin Energy, stating that the creation of a workable ELR program should not hinge on whether costs are uplifted to ERCOT market participants generally, as opposed to those entities that are responsible for a reserve margin shortfall. If an ELR program is to be ongoing, Nucor stated, costs should be uplifted to all market participants, as the conditions that cause system emergencies can and will change.

Commission response

After reviewing stakeholder comments in response to this question, the commission believes that the ELR concept needs further stakeholder input and review before the commission decides how or even if it should be adopted as a backup resource-adequacy mechanism. As a result, the commission has decided not to adopt this subsection. The commission may further consider whether a resource-adequacy backstop is needed and, if so, how it should be structured as a part of Project Number 32853.

Comments on other provisions of proposed §25.504

§25.504(a), Application

OPC was concerned that the language limits the applicability of "market power" to generators. It noted that entities other than generation entities can control generation resources and therefore they would have the ability to exercise market power. Similarly, TXU Cities said the section should apply to all entities, not just generation entities.

EDS recommended the inclusion of load entities in the definition of market power.

TXU Wholesale said "generation entity" should be one that owns and controls resources, to be consistent with PURA and §25.505.

Commission response

The commission declines to make the requested changes. Because the definition of generating entity applies to anyone controlling a generation resource, the rule already addresses OPC's concern about an entity exerting control over a generation resource. The commission does not believe that the definition needs to include loads, given the lack of significant participation by loads. The commission notes that this rule is intended to complement the commission's enforcement activity under §25.503 and PURA §39.157. Determining the need for a market mitigation plan under PURA §39.156 is a separate matter. Therefore, limiting the application of this rule only to those "owning and controlling" generation capacity, as phrased in PURA §39.156, is not necessary or appropriate for the purpose of this rule because the statute cited by TXU Wholesale is not applicable. The commission declines to change the rule as TXU Wholesale suggests.

§25.504(c), Exemption based on installed generation capacity

The commission received a number of comments on subsection (c) of the proposed rule, which establishes an exemption for certain entities with respect to systemwide market power. OPC objected to the exemption, saying it would constitute a free pass for some entities to behave as they wish and could lead to an exercise of market power. OPC cited Enron's activities in California in 2001 as an example of an entity owning less than 5% of the installed capacity could still wield considerable market power.

Regardless of any exemption, however, OPC and Reliant said that mothballed capacity should be included in any measure of market power. OPC disputed arguments that the six months re-

quired to bring a mothballed unit back into the market prevents its use for market power. Most new generating units have at least a two-year construction time, during which a mothballed unit could be brought back on line for the purposes of strategic pricing. Reliant suggested as a criterion any mothballed generating capacity which has not been included in a bona fide offer to the market for a period of at least 12 months.

DME expressed concern about the 5% exemption for market power ERCOT-wide. The commission should address defining local market power and the appropriate level of resource ownership within a smaller market that would allow an exemption from market power. Otherwise the enforcement of local market power would become an ad hoc exercise.

CPS Energy said the commission should modify the exemption to make reasonable adjustments for long-term contractual commitments, as FERC does with its market power screens. Such deductions should be based on the minimum of the monthly maximum obligations associated with such contractual commitments over the coming year. Alternatively, CPS Energy said, a similar protection could be achieved by modifying subsection (e) to permit the use of long-term contractual obligations not indexed to short-term prices to the extent that adjusted capacity is within the 5% threshold.

In conjunction with its proposal regarding the scarcity pricing mechanism in proposed §25.505, NRG proposed eliminating all price caps for entities qualifying for the 5% safe harbor exemption, and using the SPM as a price cap for entities controlling more than 5% of installed generation capacity.

TEC agreed that an exemption for generators with less than 5% ownership ERCOT-wide is needed to protect small sellers from the potential scrutiny under a screen, and that small firms should also be presumed to be free of market power in an intrazonal analysis, as such firms are incapable of profiting by withholding and may not even recognize when opportunities exist.

TXU Wholesale commented that the reference to "installed generating capacity" in the rule should refer to "installed generation capacity" since that is the term that is used in PURA and the commission's rules.

Joint Commenters recommended excluding intermittent renewable resources such as wind power from the calculation, as these resources are uncontrollable. In reply comments, Reliant said wind power should be included to the extent it is included in ERCOT's reserve margin calculations. Currently, wind power is discounted to 2.9% of its rated capability.

Commission response

The commission notes that the 5% exemption is limited to the question of whether an entity has market power on a systemwide basis. Contrary to OPC's concern, it is not a free pass for entities to abuse the market in whatever way they wish. OPC refers to Enron's behavior in California, but the commission notes that many of Enron's illegal activities (failure to fulfill ancillary capacity service obligations, for example) would be violations of ERCOT Protocols or commission rules and subject to enforcement regardless of whether or not market power was present. Furthermore, the exemption is wholly inapplicable to any determination of local market power. The IMM will monitor all entities for local market power and advise the commission of possible violations regardless of the size of the entity.

The commission has established the exemption to respond to fears expressed by small suppliers that they may be found to have market power. The definition of market power adopted by the commission focuses on the *ability* to control prices or exclude competition. Clearly, at some level, a generating entity will lack the ability to control prices even if it was actively and openly attempting to do so. The commission is persuaded that an entity with less than 5% of the installed generation capacity in ERCOT will be unable to control prices on an ERCOT-wide basis. The entity's attempts to raise prices above competitive levels will be subject to considerable risk that it will simply price itself out of the market, a risk that will increase over time as load becomes more responsive to high prices in the ERCOT spot market.

The commission declines to adopt a definition of local market power at this time. The commission prefers to determine the existence of local market power on a case-by-case basis until it can develop a generally applicable definition of the term that would cover all possible variations in local market power.

The commission disagrees with CPS Energy with respect to adjusting the rule to account for long-term contracts. The exemption only identifies entities that are deemed not to have ERCOT-wide market power. An entity that does not qualify for the exemption is not presumed to have market power. Analysis of the impact of long-term contracts would require an examination of the terms and conditions of the individual contracts. While that evaluation is important for a determination of "market power" in an enforcement case, the time and effort required to review the contracts is not justified for purposes of the exemption. For ease of administration by both the commission and affected market participants, the commission declines to make the change requested by CPS Energy.

With respect to the inclusion of mothballed capacity in the calculation, the commission notes that the rule refers to the standard definition of "installed generation capacity" stated in §25.5: "all potentially marketable electric generation capacity." As mothballed capacity is *potentially* marketable capacity, it is included in the calculation as proposed.

However, the commission is persuaded by Joint Commenters that excluding intermittent renewable resources is appropriate. The basic concern addressed by this subsection is whether a generation owner is large enough to control prices or exclude competition. By their nature, however, resources such as wind power are themselves uncontrollable and therefore impractical for an attempt to control the ERCOT-wide market. Therefore in any determination of whether an entity has market power--which would be the next step for an entity that did not qualify for the exemption--the IMM would take into account specific factors such as uncontrollable renewable resources. The commission is confident that such an analysis would reasonably and consistently exclude uncontrollable renewable resources; therefore it is reasonable to exclude such resources from the initial calculation provided in subsection (c). However, the commission finds that there is little practical difference between discounting these resources to a fraction of their rated capacity as suggested by Reliant, and discounting them completely. The commission therefore amends this subsection to exclude uncontrollable renewable resources from the calculation.

The commission agrees with the comments of TXU Wholesale and has amended the rule to refer to "installed generation capacity."

§25.504(d), Withholding of production

CenterPoint suggested the rule clarify that maintaining units offline or failure to include a generator in a bid stack without a cor-

responding maintenance event may be a factor in determining whether an entity with market power has withheld production.

DME said "marginal cost" should be refined to provide assurance to market participants of what the commission believes are legitimate offers as opposed to offers that the commission would consider to be withholding of production.

NRG objected to defining economic withholding as offer prices that are substantially above marginal cost, saying that there is at best an ambiguity and at worst a direct conflict between defining economic withholding as bidding substantially above marginal cost, while at the same time proposing an energy-only market that depends on prices well above marginal cost to function successfully. Instead, NRG said the commission should define economic withholding as whether the bid results in a unit's full output not being utilized, and whether the bid results in prices being maintained above competitive levels (which NRG defined as prices above SPM levels).

TXU Wholesale agreed that it is inappropriate to deem that market power has been abused simply because it bids in excess of marginal cost. There should be a more rigorous evaluation of the market and entity conditions before finding that a generator has withheld production. Factors include availability of generation resources, load forecasts, actual load, outages, and the entity's costs and profitability.

Commission response

The purpose of this subsection is to establish a simple principle to guide enforcement: that pricing above marginal cost (however defined) is not by itself sufficient to constitute economic withholding. The difference between the offered price and marginal cost must be large enough to indicate that an entity was exercising *market power*. The commission will make that determination on a case-by-case basis considering many different factors such as those enumerated by CenterPoint and TXU Wholesale. The commission also believes that the definition of marginal cost may be addressed on a case-by-case basis. The commission does not agree with NRG's argument that the rules are ambiguous and inconsistent. Small market participants will have broad latitude in their bidding strategies. Large market participants will be subject to greater scrutiny, but they will still be able to bid above marginal cost. The commission expects that high prices will be a feasible result, if resources are truly scarce in the market. The commission declines to change this subsection.

§25.504(e), Voluntary mitigation plan

STEC and LCRA said that any power company that owns or controls more than 20% of the generation in ERCOT should be subject to a mandatory mitigation plan. The voluntary mitigation plan in the proposed rule is not in keeping with the Legislature's desire to protect against the exercise of market power in the development of a competitive market.

OPC supported this position, and TEC agreed that a mitigation plan for suppliers identified as having market power should be a mandate, not an option. CPS Energy and TXU Wholesale disagreed, saying that an entity should not be penalized solely for having market power.

TXU Wholesale said the Peaker Entry Test it described in its written comments should be deemed as a safe harbor price benchmark. Including such a defined plan would not limit the commission's or a market participant's ability to develop and implement any other mitigation plan, TXU Wholesale said.

Commission response

The voluntary market mitigation plan contemplated by the rule is separate and distinct from a mandatory market mitigation plan required under PURA §39.156 and §39.157. PURA §39.157(c) clearly requires a market participant to file a market mitigation plan within 60 days of being found in violation of the installed capacity limitation of PURA §39.154. The rule does not alter this requirement. The rule does, however, allow a generating entity to file a voluntary market mitigation plan to assure compliance with PURA §39.157 and commission rule §25.503. The voluntary market mitigation plan does not require a prior finding of market power by the commission, so it should not be confused with a mandatory market mitigation plan ordered by the commission following a finding of market power. The commission declines to require that the mitigation plans allowed by this rule be mandatory. The commission will require the filing of mandatory market mitigation plans when justified as currently provided by PURA.

Comments on other provisions of proposed §25.505

§25.505(b), Definitions

CPS Energy suggested that a definition of "scarcity conditions" be added to the definitions in this rule. In its reply comments, Joint Commenters noted that the lack of a definition of "scarcity" allowed commenters to use their own definitions.

Commission response

The commission declines to make the changes to the rule suggested by CPS Energy and Joint Commenters for the reasons previously discussed in its response to stakeholder comments on Question Number 4 of the preamble.

CPS Energy noted that subsection (e)(3) places certain obligations on "load entities," an undefined term. CPS Energy asked for a definition of load entity.

Commission response

The commission notes that, contrary to CPS Energy's comments, the term "load entity" is already defined in the rule.

§25.505(c), Statement of Opportunities (SOO)

DME expressed concern about the commission directing ERCOT to prescribe reporting requirements for load entities and their plans for adding new load resources or retiring existing load resources. Many loads consider information, such as that regarding commodity manufacturing and processing, to be proprietary. If a competitor could determine in advance that the company was planning to enter a new market region, expand operations within that region, or close operations within that region, it might allow competitors to exploit this information. NRG wanted language inserted that all information submitted to the SOO was considered confidential. ERCOT supported the proposed language prescribing reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources. In addition, the information from QSEs relating to load resources in their portfolios that are participating in voluntary load response will enhance ERCOT's ability to produce the most accurate SOOs possible.

Commission response

The rule does not require load information as detailed as suggested by DME. It only requires load entities to provide information to ERCOT about load *resources*. This limits the requirement to how the entity plans to participate in the market as a *provider* of energy or capacity services. (As a consumer, the entity will be

aggregated with all other consumers in ERCOT's assessment of projected needs.) Because participation as a load resource is voluntary, a load entity can "exit" the ERCOT energy or capacity market without effecting any change to its core business. The rule does not require that the information be provided to the public or to other market participants; this disclosure will continue to be governed by the ERCOT Protocols. The commission anticipates that the final information provided in the SOO will be sufficiently aggregated to prevent disclosure of load-specific resource planning. Any concerns about confidentiality of information can be addressed by market participants during the ERCOT Protocol revision process. The commission does not see a need to modify the rule language in response to DME's comment.

CenterPoint suggested that language be added to instruct ERCOT to use existing information already being provided by market participants and to prescribe additional reporting requirements, as needed.

Commission response

The commission assumes that ERCOT will use existing information being provided by market participants if doing so meets the requirements of this rule and is cost-effective but believes that the rule language should not restrict ERCOT's ability to collect the information it needs for the SOO. The commission declines to amend the rule as suggested by CenterPoint.

ARM believed that the rule should require a two-year notice period for mothballing or retiring a plant, which would provide the competitive market with sufficient lead time to replace the retired or mothballed generation to preserve system reliability. ARM believed that a shorter notice period would create potential opportunities for generation owners to manipulate the market through strategic retirement or mothballing of generation resources.

TXU Wholesale replied that the two-year notice for mothballing or retiring generation is unworkable. Economic and reliability conditions can change considerably in an electricity market in the course of two years. Furthermore, if a generator were bound legally to a schedule in mothballing or retiring a unit, the owner could be driven into bankruptcy by operating the unit without sufficient cost recovery

Joint Commenters, in their reply comments, suggested that ARM's proposal would be excessive and unreasonable, and therefore should be rejected. Decisions on whether to retire or mothball a generating unit are vital to the owner's ability to manage its assets and risk and are based on operational needs and the market. Notice two years in advance would impact generators' ability to control their costs and manage their assets in a way that would likely deter new investment. Joint Commenters noted that the appropriate notice period for retirement or mothballing of a unit was considered and decided by the commission less than 18 months ago, when it established a 90-day notice period.

Commission response

The commission agrees with TXU Wholesale and Joint Commenters that ARM's suggestion to require a two-year notice period for mothballing or retiring a plant would be unworkable and would hinder the owner's ability to manage its assets and risks. Such restrictions on market exit would make market entry of new generation less appealing and could increase the costs to load in the long run. As a result, the commission declines to amend the rule as suggested by ARM.

Joint Commenters stated that similarly, a decision to winterize a plant must be made on far more current information, but under §25.502(f) of the commission's rules, and ERCOT Protocols Section 6.5.9.1, winterizing is considered mothballing.

Commission response

The commission believes that ERCOT and its stakeholders can address this issue through the protocols development process and declines to address the issue in the rule.

§25.505(d), Projected Assessment of System Adequacy (PASA)

CenterPoint suggested adding the following to the list of information published in the PASA: forecasts of generation, import capability, and reserve using NERC planning criteria by ERCOT zone or area. CenterPoint also recommended that voltage and reactive requirements by ERCOT zone or area be included in the PASA.

Commission response

The commission believes that the suggestions from CenterPoint could provide the market with a more complete and useful set of information. However, the commission cannot at this time judge the costs and benefits of including the information that CenterPoint recommended. The commission declines to amend the rule as suggested by CenterPoint but believes that stakeholders can work with ERCOT to determine see if such information is cost-effective to include in a PASA.

ARM suggested that all PASA data components be reported in the PASA on a zonal basis.

Commission response

The commission agrees with ARM that aggregated resource information should be reported in a PASA on a zonal basis to provide more information and transparency to the market and amends the rule accordingly.

ARM suggested that the Medium-Term PASA reflect planned retirement or mothballing of resources in addition to planned maintenance outages, which would ensure that the Medium-Term PASA provides a more realistic picture of future supply-demand conditions to market participants and reduce opportunities for market manipulation through the strategic withholding of capacity resources.

Commission response

The commission assumes that ERCOT will take into account the retirement and mothballing of resources in its Medium-Term PASA. The commission, however, wishes to give ERCOT the flexibility to determine which resources are likely to be mothballed or retired rather than fixing criteria in this rule.

ERCOT stated that the critical tasks necessary to develop a Medium-Term PASA, including developing linkages between existing systems and modifying existing processes, will require significant incremental increases in ERCOT human resources. ERCOT urged the commission to consider whether the value of the Medium-Term PASA over the value provided by the proposed SOO would justify the additional ERCOT resource requirements. Reliant, in its reply comments, concurred.

TXU Wholesale suggested eliminating subsection (d)(1)(D). TXU Wholesale stated that it is impractical to identify three years in advance the availability of future resources due to outages or scheduled maintenance. TXU Wholesale stated that information that is so speculative is, at best, minimally useful

to the market, and at worst, dangerously misleading. Providing such information three years in advance has minimal usefulness to the market. Reliant disagreed with TXU Wholesale in its reply comments, stating that this information is critical to ensure resource adequacy.

ARM urged the commission to require ERCOT to publish both the SOO and the Medium-Term PASA, as ARM believed the Medium-Term PASA provides incremental value over the SOO. ARM stated that one of the most important building blocks of a successful energy-only resource market is the dissemination of adequate information to the market regarding projected resource needs. This information, according to ARM, allows market participants to construct resource additions with a sufficient lead time to meet the requirements of the region.

ARM stated that while the SOO provides such information for a long-term horizon of five to ten years, the additional value of the medium-term PASA is that it provides projected resource adequacy data over a three-year timeframe that is more closely linked to the time horizon for the addition of new peaking generation capacity. Moreover, the Medium-Term PASA is designed to provide more detailed system data relative to the SOO, including projected loads and resources disaggregated by ERCOT zone and anticipated transmission constraints. Finally, the Medium-Term PASA would be published on a monthly basis, giving market participants more current information than the SOO, which would be published annually.

ERCOT supported the proposed language prescribing reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources, in part because the information from QSEs relating to load resources in their portfolios that are participating in voluntary load response will enhance ERCOT's ability to produce more accurate Medium-Term PASAs.

In its reply comments, ERCOT stated that the biggest challenge would be including information about planned outages into the projection of transmission constraints. If the requirement were removed, the development of the Medium-Term PASA is achievable. With respect to the Short-Term PASA, ERCOT agreed that the planned outage information would provide value but would require ERCOT to develop automated systems that would either feed data from the outage scheduling system into the market forecasting model or expand the day-ahead calculation of transmission limits planned for implementation as part of the nodal market to seven days. Either option is feasible, but only with systems that are being developed as part of the nodal market design. Accordingly, ERCOT recommended eliminating the term "planned outages" in subsection (d)(1)(C) and (2)(C), and adding a new subsection (d)(1)(E) instructing ERCOT to file a plan by October 1, 2006, for completing a project that would incorporate planned outage data into the Short-Term PASA upon nodal market implementation.

ERCOT stated that the provision of aggregated information on the availability of resources also will change ERCOT's system and internal processes, primarily to combine information on future levels of installed generation with information on resource outages.

Commission response

The commission disagrees with TXU Wholesale's suggestion to eliminate the Medium-Term PASA. As ARM and Reliant stated in their comments, market participants need the information provided in the Medium-Term PASA to help meet their resource adequacy needs. The commission agrees that the Medium-Term PASA provides valuable information to market participants and declines TXU Wholesale's proposal to amend the rule by eliminating this section. The commission also finds that ERCOT's concerns have merit. The commission realizes the resource limitations confronting ERCOT staff during the implementation of the nodal market. The commission will work with ERCOT to minimize the work needed to provide market participants with the information required in this rule. For instance, the commission finds it acceptable if ERCOT can meet the data posting requirements with a minimum of post-processing of the data. Therefore, the commission has amended the rule language according to ERCOT's suggestions in its reply comments.

Reliant suggested that the Medium-Term PASA project conditions for the subsequent four years rather than three years. ERCOT replied that adding another year to the outlook would potentially cause the PASA to produce misleading results because of the limited accuracy of information four years out.

Commission response

The function of the Medium-Term PASA is to provide market participants with information on the availability of planning reserves up to three years in the future. With respect to Reliant's suggestion to extend the Medium-Term PASA to four years, the commission finds ERCOT's reply persuasive and therefore declines to make the change suggested by Reliant.

ERCOT anticipated the need for substantial stakeholder discussion in order to develop protocols that will prescribe how to integrate the details of the short-term PASA and those of the medium-term PASA. Reliant suggested eliminating the Short-Term PASA, because the Short-Term PASA was duplicative of the Medium-Term PASA.

Commission response

The commission declines to eliminate the Short-Term PASA, as the information reflects the availability of operating reserves for the next week, which is different from the information provided in the Medium-Term PASA. The commission agrees with ERCOT's assertion that stakeholder discussion and input will be needed to complete successfully the integration of the Short-Term PASA and Medium-Term PASA. The commission requests that ERCOT keep the commission informed on a timely basis on the progress and timetable associated with this integration.

TXU Wholesale suggested eliminating this subsection (d)(2)(D). TXU Wholesale stated that revealing information to the market on resource outages will only increase the ability of other market participants to impact prices through strategic behavior. Because of the small size of certain ERCOT zones, TXU Wholesale believed, revealing aggregated information regarding resource outages will reveal specific outage information for certain generators. When participants know that specific supply will be constrained by outages, they have the information necessary to manipulate their own generation availability in a manner that exacerbates the problem of reduced supply and causes an overall artificial increase in prices. Reliant disagreed with TXU Wholesale in its reply comments, stating that this information is critical to ensure resource adequacy.

Commission response

The commission disagrees with TXU Wholesale's assertion that providing aggregated information on resource availability will harm the market. Providing resource information up to seven days in advance allows market participants to have a

clearer picture of the amount of planned outages. Owners of generation have great discretion in scheduling planned outages, including changing the timing of those planned outages. As a result, providing aggregated resource information to market participants allows them to more easily bring generation or load resources into the market if the projected resources are not sufficient to meet demand. The commission finds the value of providing market participants with aggregated data on resource availability greatly outweighs any concerns about potential misuse of that information. As a result, the commission declines to amend the rule as TXU Wholesale has proposed.

§25.505(e), Filing of resource and transmission information with ERCOT

ERCOT supported the timely advance provision of the information required in this subsection, which will increase ERCOT's ability to meet reliability requirements and enhance the market's ability to respond to outages without ERCOT intervention.

CenterPoint suggested that language be added to instruct ERCOT to use existing information already being provided by market participants and to prescribe additional reporting requirements, as needed. CenterPoint suggested adding language that would explicitly state that the information would be incorporated into the SOO and PASAs. NRG wanted language inserted that all information submitted to meet this requirement was considered confidential.

Commission response

The commission believes that ERCOT will work with stakeholders through the protocol development process to ensure that the concerns expressed by CenterPoint and NRG are considered and addressed. The commission does not find it necessary to amend the rule as suggested by CenterPoint or NRG.

Reliant recommended that subsection (e)(3) be modified to require reporting of unavailability rather than availability and have the commission order ERCOT to enhance ERCOT's outage scheduling to allow LaaRs to provide outage scheduling information. ERCOT, in its reply, recommended using the ERCOT stakeholder process to consider the value of adding load resource outages into ERCOT's outage scheduling system.

Commission response

The commission does not see the benefit of making the change that Reliant has suggested and declines to amend the rule accordingly. The commission agrees with ERCOT and suggests that Reliant use the ERCOT stakeholder process to address its concerns about adding load resource outages into ERCOT's outage scheduling system.

CenterPoint recommended that generation entities file their gross MW and MVAR dependable capacity in addition to net dependable MW capability.

Commission response

The commission declines to amend the rule as suggested by CenterPoint but recommends that stakeholders work with ERCOT to determine if including this information is useful and cost-effective for ERCOT in developing the reports required by this rule.

CPS Energy noted that subsection (e)(5) has a requirement that LSEs provide "complete information on load response capabilities pursuant to bilateral agreements between LSEs and their customers." CPS Energy believed that the term "load response capabilities" and the intended scope of the term "complete information" need to be clarified.

Commission response

The commission believes that ERCOT needs to continue to improve its load forecasting methodologies. Information from load resources is an important part of such forecasts, particularly as more demand-side resources become available in ERCOT. The commission believes that ERCOT is in the best position to determine what specific information it needs to estimate and forecast price-responsive load. The commission expects that ERCOT will work with stakeholders through the protocol development process to clarify the issues that CPS Energy has raised. As a result, the commission does not find it necessary to amend the rule as suggested by CPS Energy. The commission clarifies the rule by indicating that the information should include self-arranged supply as well as bilateral contracts.

§25.505(f), Publication of resource and load information in ERCOT markets

See discussion of Question 2, disclosure of disaggregated data.

§25.505(g), Credit standards for qualified scheduling entities

See discussion of Question 3, credit requirements.

§25.505(h), Improving price responsiveness of load

Joint Commenters supported this subsection as written.

Various Parties stated that the impact of the proposed rule language in this subsection is limited due to a narrow focus on demand profiling. What is lacking is any coherent program to encourage widespread adoption of demand response, load management, and price-responsive demand. With the onset of the new nodal market structure in 2009, and the gradual increase in the cap on balancing energy prices, Various Parties stated that is important to develop stabilizing mechanisms in the electricity market that may dampen extreme price spikes.

Various Parties noted that demand response includes a far wider spectrum of responses to prices and incentives that should be investigated. Various Parties noted that current technology allows the aggregation of commercial demand into blocks that are controllable and highly responsive, and that could be potentially dispatched as an operating reserve.

Various Parties noted that prior to restructuring, the ERCOT utilities reported over 3,100 MW of interruptible load in ERCOT. Many direct load control (DLC) programs and group load curtailment programs that existed prior to restructuring are no longer in operation. Various Parties suggested that the rule make a strong statement in support of all demand-side programs, and proposed the establishment of a series of pilot programs and initial studies that could provide information to the commission to support a separate rulemaking to determine the optimal policies to encourage the development of price responsive electricity demand in Texas.

Various Parties stated that because there is a cap placed on the amount of interruptible load that can provide responsive reserves, there is essentially a "waiting list" of more than 500 MW of load than could be interrupted without notice. These loads cannot curtail at ERCOT's request because there is no program or market mechanism available to permit them to participate. EDS noted some clear and substantial barriers in the current market design that dramatically limit load participation and that loads, as a practical matter, have only two programs from which

to choose if they wish to participate as a demand-side resource in ERCOT: Responsive Reserve Service and Non-Spinning Reserve Service.

EDS noted that industrial loads have strong incentives to retain the voluntary option of responding to prices as they occur rather than committing ahead of time for little or no added financial gain under the Balancing-Up Load (BUL) program. EDS encouraged the commission to direct ERCOT by the end of the year to review the BUL program, identify the causes for the lack of participation in the program, and suggest improvements to the program that would substantially increase participation and reduce energy prices.

EDS noted that loads are currently excluded from participating in Replacement Reserve Service and balancing energy service (BES) because further system changes are required, and a timeline for completion has not been set. EDS highlighted that the BUL program suffers from major design flaws that make it unusable. Reliant, in its reply comments, stated that the BUL program should not be fixed, as it would not carry over into the nodal market design.

Various Parties stated that ERCOT planners and operators need to know when a market-based curtailment or load response will be triggered as well as their impact on resource requirements. Various Parties stated that under criteria jointly established by ERCOT's Generation Adequacy Task Force and the Demand Side Working Group, a load that is simply curtailing on its own volition when prices rise does not qualify as an adjustment to a reserve margin. These criteria may need to be altered so that the value of ELR contracts may be recognized as a reserve margin adjustment and reliability resource.

Good Company stated that an energy-only market does not encourage demand response or energy efficiency *per se*. An energy-only market requires higher prices, especially during peak hours, and the ability of load to benefit from responding to those higher prices, which will encourage demand response and energy efficiency.

Various Parties stated that a token or nominal incentive payment to load for the additional costs and obligations associated with formally bidding a response to the market is needed to entice them to make such a formal commitment. If the incentive payment is too low, then the load will passively respond to high prices, which ERCOT will find difficult to detect in forecasting load and has limited use for ERCOT's system planners and operators.

Nucor stated that it is absolutely necessary for ERCOT to work with market participants on an ongoing basis to create the necessary conditions for, and remove impediments to, price response by load. Price-responsive loads must be insulated from reliability-unit commitment capacity short penalties for responding to real-time prices. Notice times of at least ten minutes of the applicable zonal or nodal settlement price must be maintained.

Nucor stated that the periodic progress reports on ERCOT's efforts to improve price responsiveness of load was a good approach and suggested that the commission solicit comments on each status report to ensure the broadest input from stakeholders.

Occidental stated that the commission should clarify its intent for ERCOT to work with market participants to create the necessary conditions for, and remove impediments to, *market-based* price response by load. STEC and CPS Energy, in their reply comments, concurred.

Occidental suggested that the commission require the review of the current status of implementation of previously approved PRRs relating to demand response and the incorporation of demand response in the Texas Nodal Market.

Reliant suggested that an evaluation of demand-side response take place before offer caps were raised. ERCOT, in its reply comments, stated that unlike the proposed list of demand-side issues in the proposed rule, which directs ERCOT to analyze the existing market structure to provide a factual basis for discussing key aspects of price responsiveness of load, Reliant's list would mandate that ERCOT draw conclusions regarding the adequacy of the current market and make recommendations to change the market. ERCOT stated that the establishment of a demand-response program involves policy and economic issues that can be addressed only by the commission. ERCOT recommended that the additional items proposed by Reliant not be added to the list but rather deferred to the upcoming commission project on demand response.

Good Company stated that the primary barrier to load shifting by smaller commercial and industrial loads is the lack of "smart meters" that will replace profiling with actual consumption data. Currently, while large industrials can choose time of day or other programs that reward them for shifting consumption from high-cost hours, other customers have little incentive to curtail or shift consumption since they face average rates based on stylized demand profiles. Retailers that use profiles also have little incentive to encourage such behavior with their customers.

In order to fully exploit the potential benefits of demand response, Good Company said, it is important to install smart meters on an almost universal basis, implement demand-response pilot programs, and develop time-of-use pricing programs.

EDS encouraged the commission to direct ERCOT to develop price-responsive programs that will not encourage offerings from REPs but allow non-load-serving QSEs to schedule and receive benefits of price response from loads. EDS also encouraged the commission to review the CenterPoint tariff provision that imposes a $90 per month charge for IDR metering, which EDS considered a barrier to demand-side response by smaller commercial loads.

Joint Commenters, in their reply comments, noted that MCSM lowered the market clearing offers during the period of rolling blackouts on April 17, 2006, which would provide little incentive for voluntary demand response. OPC, in its reply comments, expressed the opinion that allowing prices to rise to the cap on April 17 would not increase new generation investment over time. OPC opined that loads would not hedge against such spikes, choosing to pay the market clearing price instead.

EDS also noted that loads face prices that are often revised downward the next business morning and that loads can't respond to prices when they don't know whether the price will be adjusted later. EDS requested that ERCOT report to the commission on the reliability of its real-time energy prices and establish a minimum threshold of at least 99.9% accuracy. Reliant, in its reply comments, concurred with EDS. ERCOT, in its reply comments, noted that ERCOT posts accurate real-time data, and that the examples EDS lists do not reflect the lack of reliability of ERCOT's posting of data; rather they represent situations where prices were adjusted in a post-hoc manner as required by MCSM.

Good Company suggested that transmission and distribution utilities (TDSPs) be encouraged to establish demand-response programs behind distribution substations that are facing congestion or reliability issues. Reliant, in its reply comments, disagreed with Good Company that TDSPs should be involved with demand-side programs because they are not retailers, and retailers operating in the free market will provide innovative programs when the necessary infrastructure is in place and market conditions are ripe.

Austin Energy supported demand-side participation and recommended that the commission direct ERCOT to provide a report to the commission within six months of the effective date of the rule regarding existing passive demand response. ERCOT replied that a single such study in an evolving market might be inconclusive and would be unnecessary, given the new LSE reporting requirements proposed in §25.505(e)(5). ERCOT noted that this effort will require additional resources at ERCOT, at least through the thirty-month reporting requirement.

CPS Energy stated that the section was too prescriptive and recommended eliminating specific instructions and timelines for ERCOT. CPS Energy said that subsection (h)(2) should be directed to TDSPs. CPS Energy also stated that the accuracy of load profiles with respect to demand-side programs is not relevant, because, by definition, they cannot be used to provide accurate price signals to loads because load profiles do not provide accurate measures of actual consumption for an individual customer on a 15-minute, hourly, or even daily basis. CPS Energy suggested eliminating subsection (h)(1) - (4).

Occidental stated that the commission should specifically order ERCOT to implement PRR 307, *Controllable Resources*, without delay. The protocol revision, which was approved in March 2002, allows load resources to provide "generation type" (also referred to as "AGC-type") ancillary services to the ERCOT market. The PRR would allow load resources that can follow Automatic Generation Control (AGC) dispatch signals from ERCOT and respond continuously to frequency deviations like generation resources, to provide AGC-type ancillary services such as Regulation Up Service, Regulation Down Service, and Responsive Reserve Service.

Occidental stated that implementing PRR 307 would be the easiest and quickest way to improve participation of load resources in the ERCOT market and would make it unnecessary to prorate load resource participation in the Responsive Reserve Service. Occidental stated that implementing this PRR would be a signal from the commission that the process outlined in subsection (h) would not result in delayed implementation of other PRRs related to demand-side resources. Occidental noted that other markets such as PJM and the NYISO will be allowing controllable load resources to participate in AGC-type ancillary service markets in the near future.

EDS stated that loads can not participate in Regulation Up and Regulation Down service because further system changes are required to implement PRR 307 to send AGC signals to loads. EDS noted that implementation of PRR 307 has the lowest priority assigned to any ERCOT project.

Reliant, in its reply comments, disagreed with Occidental, EDS, and others directing ERCOT to make major system changes that will have limited application to only a very few load resources who can meet the technological requirements to provide such service.

ERCOT, in its reply comments, suggested that Occidental should appeal the implementation ranking of PRR 307 at ERCOT rather than ask the commission to implement it as part of a rulemaking.

Commission response

The commission is committed to encouraging greater participation by load resources in the ERCOT market. However, after reviewing stakeholder comments on this subsection, the commission believes that this subject deserves a more thorough review along with other demand-side issues so that a comprehensive commission policy can be developed. Accordingly, the commission has established a new rulemaking project, Project Number 32853, *Evaluation of Demand-Response Programs in the Competitive Electric Market*, to address demand-response programs. Since the issues will be addressed in Project Number 32853, the commission has decided to adopt the rule without this subsection. The commission will further consider the issues stakeholders raised in their comments in Project Number 32853.

§25.505(i), Scarcity Pricing Mechanism (SPM)

Regarding subsection (i)(1), see discussion of Question 5, timing of the annual resource adequacy cycle. Regarding subsection (i)(6), see discussion of Question 4, considerations in setting the levels of the system-wide offer cap.

Regarding subsection (i)(2), Peaker Operating Cost (POC), TXU Wholesale suggested that the POC parameter should be adjusted upward to account for all of the hypothetical peaker's variable costs of operation (*e.g.*, wear and tear on the peaker from starting the unit, startup fuel costs) and market operating risks. TXU Wholesale recommended using a heat rate of at least 13 MMBtu/MWh based on the regression analysis of its consultant. TXU Wholesale analyzed the heat rates of 158 peaking units that are currently operating in ERCOT and found that heat rates ranged from 9.4 to 18.0, with the mean and median heat rate of a fully-loaded peaking unit being 11.7.

ARM disagreed with the changes TXU Wholesale proposed in subsection (i)(2). ARM noted that the annual PNM limit is designed to provide a sufficient revenue stream for a new conventional combustion turbine, not older existing generation facilities. Therefore, ARM continued, the POC should be calculated based on a heat rate of 10 consistent with the heat rate that would be expected from a new peaking generation facility.

Commission response

The commission agrees with ARM's reply to the TXU Wholesale proposal to raise the heat rate in the POC calculation from 10 to 13. ARM's reply comments accurately represent the commission's rationale in choosing a heat rate of 10 in the POC calculation. In addition, a large portion of the non-fuel operating and maintenance costs that TXU Wholesale listed, such as wear and tear, are related to depreciation, which the commission considers part of the capital costs of replacing a generation unit and is included in setting the PNM. Therefore, the commission declines to amend the rule along the lines TXU Wholesale suggested.

Regarding calculation of the PNM, TXU Wholesale stated that the SPM should account for prices in the bilateral market, not just real-time energy prices at ERCOT and should be calculated on a 12-month, rolling basis. TXU Wholesale suggested using a time-weighted average of prices recorded for each settlement interval in that hour.

ARM disagreed with the changes TXU Wholesale proposed in subsection (i)(4) and urged the commission to reject them. ARM

noted that bilateral energy prices are for contracts of various lengths. Mixing energy prices from non-spot bilateral transactions with spot market prices for balancing energy is not appropriate because it will understate the revenue opportunity for resources in the balancing energy market. Moreover, resources that are contracted bilaterally have the ability to capture scarcity rents over their term, as the price for power under such contracts should have been negotiated with the anticipation that the buyer would potentially face very high spot market prices for balancing energy during periods of resource scarcity but for the contract.

Commission response

The commission agrees with ARM's evaluation of TXU Wholesale's proposal to amend the language in this subsection. TXU Wholesale's proposal would result in an inappropriate mixing of bilateral prices and spot market prices. The commission notes that bilateral contract prices are often higher than prices determined in a centralized spot market because of factors such as counterparty or credit risks, the size of the transactions involved, and customized features of the bilateral contract. Bilateral contracts also lack the transparency and widespread participation that are necessary for the SPM to have the confidence of all market participants. In addition, the differences in the terms and conditions of bilateral contracts would make their inclusion in the SPM calculation very complex. For all of these reasons, the commission declines to amend the rule along the lines TXU Wholesale suggested.

Regarding the LCAP, TXU Wholesale stated that its review of units in the ERCOT market that the current proposed levels for LCAP underestimated the long-run marginal costs of a peaker and did not capture changing trends in capital costs and operating profiles of peakers over time. ARM replied that LCAP is not about attracting new construction; it is about ensuring the sustained receipt of monopoly rents does not occur. The LCAP value needs to be set to ensure all generators, regardless of efficiency, have the ability to recover their variable operating costs on a going-forward basis. Otherwise, inefficient generation may not operate, which could lead to involuntary load curtailments, as it is likely a resource adequacy problem would be present if the LCAP value ever came into force.

ARM recommended a lower LCAP than in the proposed rule to stop the receipt of sustained monopoly rents by resources. ARM recommended that the commission adopt an LCAP value equal to no more than 15 times the Houston Ship Channel Index (HSCI) plus a $2 per MWh allowance for non-fuel variable operations and maintenance expenses. The change will ensure that generation resources do not earn sustained monopoly rents after already having the opportunity to earn a sufficient annual contribution to fixed and sunk costs. CPS Energy, in its reply comments, supported ARM's general approach but suggested using an 18 heat rate rather than a 15 heat rate to make sure peaking resources can cover their operating costs.

OPC expressed concerned that the proposed LCAP was set too high. ARM, in its reply comments, agreed with OPC. OPC stated that the LCAP should recognize the improvement in heat rates in gas turbines. OPC advocated that the LCAP be set at ten times the Houston Ship Channel (HSC) gas price index with no other conditions and as long as the HCAP is not changed. The multiplier of ten times should be reviewed annually to reflect efficiency improvements in gas turbines.

OPC believed that the LCAP level seems to greatly exceed any calculation of a price that would cover both marginal costs and some fixed costs, particularly after a peaker has recovered $150,000 per MW. Therefore, OPC proposed that the LCAP be tied to the heat rate of the most modern peaking unit. ARM, in its reply comments, disagreed with OPC's proposal of using the heat rate of the most modern peaking unit, stating that older, less-efficient units need to cover their operating costs.

Commission response

The commission agrees with ARM's comments that an important purpose of the LCAP is to prevent excessive transfers of wealth from load to generation during years when reserve margins are thin. Allowing excessive recovery would result in an unwarranted transfer of wealth to generators from load, a situation that the commission is attempting to avoid. The other consideration is that it be set at a level that will permit most generating units in the market to operate profitably under the cap. Allowing a minimal recovery above short-run marginal costs for generation would limit demand-side response in the market and reduce the incentives for peaking generation to be available to offer into the ERCOT spot markets. The decentralized unit commitment in the zonal market design likely would exacerbate the problem.

The commission intends to set the LCAP at a high enough level to provide incentives for generation and load resources to be available to respond to shortage conditions in the remaining portion of the annual resource adequacy cycle when the PNM has exceeded the $175,000 per MW threshold. The commission believes that the formula for LCAP strikes the appropriate balance and therefore declines to amend the rule as suggested by ARM, TXU Wholesale, CPS Energy, and OPC.

TIEC noted that virtually every competitive electricity market in the world contains some type of "circuit breaker" to control unjustified price excursions from whatever cause and supported the concept of a circuit breaker to avoid excessive and unjustified transfers of wealth from consumers to other market segments.

LCRA stated that a "circuit breaker" mechanism similar in concept to that used in the Australian market would be beneficial for the ERCOT market. The mechanism would trigger if the PNM in any 168-hour period is $50,000. This mechanism would allow for a "cooling off" period of 168 hours during which the system-wide offer cap would be set at LCAP. LCRA proposed the following revised language for the rule: "If the PNM for any consecutive 168-hour period exceeds $50,000, then the system-wide offer cap shall be set at LCAP for the immediately following 168-hour period."

In its reply comments, OPC supported LCRA's circuit breaker mechanism, which OPC believed would provide protection against unintended or unforeseen consequences of the new rule. OPC noted that the circuit breaker was similar to the one used in the Australian market. In its reply comments, ARM stated that it conceptually supports LCRA's proposed circuit breaker, but believed the dollar amount of the threshold is too low because a substantial portion of a year's resource scarcity may take place in a single week's time (*e.g.*, during an extreme heat wave). ARM proposed a $100,000 per MW threshold for the circuit breaker based on an offer cap of $6,000 per MWh or a threshold of $85,000 per MW with an offer cap of $5,000 per MWh. CPS Energy, in its reply comments, opposed the LCRA circuit breaker because it would prevent the required pricing levels from occurring at all of the times when they need to occur. CPS Energy suggests that the required level of prices be allowed to occur when required as envisioned by the rule.

TXU Wholesale replied that the commission should not adopt a "cooling-off period" or "circuit breaker" for high prices, if those mechanisms are designed so that their operation could mitigate legitimate scarcity prices or deny generators the opportunity to cover long-run costs. TXU Wholesale stated LCRA's analogy to the Australian market's Cumulative Price Threshold (CPT) was misplaced. The temporary price caps in the Australian market are effective only until the end of the trading day on which the CPT falls below the fixed threshold. Thus, in the Australian market, the price threshold is much higher, and the price cap is not artificially sustained for 168 hours.

Commission response

The commission notes that the HCAP in ERCOT is significantly lower than its counterpart in Australia. This factor, along with the fact that the ratio of all-time peak to average summer peak demand in ERCOT is not as high as it is in Australia, reduces the need for a weekly circuit breaker. The commission notes that LCRA's proposed circuit breaker would be tripped at a much lower level than occurs in the Australian market. ARM's proposed level is less invasive, but the commission agrees with TXU Wholesale that an additional weekly circuit breaker could interfere with scarcity pricing in ERCOT and therefore declines to include such a mechanism in this rule.

Joint Commenters opined that the proposed HCAP levels are appropriate but the threshold that would drop the system-wide offer cap from HCAP to LCAP is too restrictive. Joint Commenters recommended a four-year resource adequacy cycle with a PNM of $350,000 per MW with an LCAP trigger when the PNM reaches $300,000 per MW to ensure sufficient revenue opportunities for resources. Also, Joint Commenters noted that the $300,000 per MW reference is to prevent bouncing between HCAP and LCAP on a daily basis.

Commission response

As previously discussed, the commission has determined that the proposal by Joint Commenters to raise the PNM to $350,000 per MW would lead to excessive transfers of wealth from load to generation without any additional benefits to the market. The commission declines to amend the rule accordingly.

ARM stated that the proper selection of the annual PNM, the HCAP and the LCAP is critical ensuring new resource investment is made while protecting consumers. ARM stated that the annual PNM limit must allow gas-fired peaking resources the opportunity to earn a return competitive with the stock market within a three-year recovery period. The return implied with the proposed rule's $150,000 per MW threshold for the PNM is less than 3%, compared to a 12.4% return for "large cap" stocks. Using a 12.4% return on investment as a benchmark and cost information for a conventional combustion turbine, ARM believed that the PNM should be set at $175,000 per MW. ARM suggested that the annual PNM limit be raised from $150,000 per MW to $175,000 per MW to ensure sufficient annual revenue opportunities for resources. OPC, in its reply comments, opposed any increase in the PNM, which in the rule is set at a level higher than used in the Australian market.

Commission response

The commission agrees with ARM that the $150,000 per MW PNM may be insufficient to allow recovering of capital costs of new peaking generation and amends to rule to raise the PNM to $175,000 per MW.

Regarding IMM review of the SPM, TXU Wholesale suggested changing IMM review from voluntary to mandatory and suggested that the IMM review the HCAP and LCAP in light of the value of lost load and the economics of peaking generation.

Commission response

The commission is aware of the need to monitor the progress of the energy-only resource adequacy mechanism. The commission expects the IMM to review the SPM annually, and will welcome public comment on the IMM's review. The commission, however, believes that a change in the rule is unnecessary and declines to amend the rule as proposed by TXU Wholesale.

§25.505(j), Authority to enter into ELR contracts to maintain resource adequacy

See discussion of Question 6, resource adequacy backstop.

§25.505(k), Development and implementation

ARM stated that the success of the energy-only resource adequacy mechanism will be seriously undermined if market participants believe that the commission will arbitrarily and frequently intervene in the markets to modify critical elements of the mechanism. Therefore, it is vital that the rule clarify that the commission will only override the provisions of the energy-only resource adequacy mechanism as a last resort, and only in response to extraordinary circumstances.

ARM further suggested that the proposed rule should establish procedural requirements that would be met before the commission intervenes in the operation of the mechanism. For instance, a commission decision to take actions inconsistent with the resource adequacy mechanism should be preceded by a public inquiry into the performance of the mechanism, and such an inquiry should give all interested parties an opportunity to express their views. This inquiry could take place as part of the commission's consideration of the IMM annual review of the scarcity pricing mechanism. Joint Commenters, in their reply comments, agreed with ARM's recommendation.

Reliant proposed elimination of the second sentence in subsection (k) because it was too vague. Joint Commenters, in their reply comments, also supported the alternative that Reliant suggested if the commission does not add the sentence quoted above. TXU Wholesale opined that the IMM should review the details of the SPM mechanism annually.

Commission response

The commission agrees with ARM that for the energy-only resource adequacy mechanism to be successful, the commission needs to minimize what the market perceives as arbitrary and frequent intervention in ERCOT markets. The commission also agrees with ARM and TXU Wholesale that public review and discussion at the commission and IMM review of the energy-only resource adequacy mechanism should identify any shortcomings and facilitate the development of improvements to the mechanism. The commission understands the commenters' concerns and amends the rule to state that commission action under this section will be taken to protect the public interest. This standard is consistent with the commission's duty under PURA §39.001 and will provide assurances that the commission's action will not be arbitrary.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this amendment and these new sections, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment and the new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically, PURA §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anticompetitive; PURA §39.001, which establishes the legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; PURA §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; and PURA §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.004, 39.001, 39.151, and 39.157.

§25.502. Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas.

(a) Purpose. The purpose of this section is to protect the public from harm when wholesale electricity prices in markets operated by the Electric Reliability Council of Texas (ERCOT) in the ERCOT power region are not determined by the normal forces of competition.

(b) Applicability. This section applies to any entity, either acting alone or in cooperation with others, that buys or sells at wholesale energy, capacity, or any other wholesale electric service in a market operated by ERCOT in the ERCOT power region; any agent that represents such an entity in such activities; and ERCOT. This section does not limit the commission's authority to ensure reasonable ancillary energy and capacity service prices and to address market power abuse.

(c) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context indicates otherwise.

(1) Competitive constraint--A transmission element on which prices to relieve congestion are moderated by the normal forces of competition between multiple, unaffiliated resources.

(2) Generation entity--an entity that owns or controls a generation resource.

(3) Market location--the location for purposes of financial settlement of a service (*e.g.*, congestion management zone in a zonal market design or a node in a nodal market design).

(4) Noncompetitive constraint--A transmission element on which prices to relieve congestion are not moderated by the normal forces of competition between multiple, unaffiliated resources.

(5) Resource--a generation resource, or a load capable of complying with ERCOT instructions to reduce or increase the need for electrical energy or to provide an ancillary service (*i.e.*, a "load acting as a resource").

(6) Resource entity--an entity that owns or controls a resource.

(d) Disclosure of offer prices. ERCOT shall publish on its market information system:

(1) no later than noon of the following calendar day, the identities of all entities submitting offers for which the energy offer price was $300 per megawatt-hour (MWh) or higher, or the capacity offer price was $300 per megawatt per hour (MW/h) or higher, and the corresponding settlement intervals and market locations;

(2) no later than noon of the following calendar day, the identity of any entity whose offer sets a price for energy above $300/MWh (along with the corresponding settlement interval and market location) and the identity of any entity whose offer sets a price for capacity above $300/MW/h (along with the corresponding settlement interval and market location); and

(3) concurrent with the publication of a corrected market clearing price, the identity of any entity who is paid more than the market clearing price for the service and the corresponding settlement interval and market location.

(4) The requirements of this subsection shall terminate on October 1, 2006.

(e) Control of resources. Each resource entity shall inform ERCOT as to each resource that it controls, and provide proof that is sufficient for ERCOT to verify control. In addition, the resource entity shall notify ERCOT of any change in control of a resource that it controls no later than 14 calendar days prior to the date that the change in control takes effect, or as soon as possible in a situation where the resource entity cannot meet the 14 calendar day notice requirement. For purposes of this section, "control" means ultimate decision-making authority over how a resource is dispatched and priced, either by virtue of ownership or agreement, and a substantial financial stake in the resource's profitable operation. If a resource is jointly controlled, the resource entities shall inform ERCOT of any right to use an identified portion of the capacity of the resource. Resources under common control shall be considered affiliated.

(f) Reliability-must-run resources. Except for the occurrence of a forced outage, a generation entity shall notify ERCOT in writing no later than 90 calendar days prior to the date on which it intends to cease or suspend operation of a generation resource for a period of greater than 180 calendar days. Unless ERCOT has determined that a generation entity's generation resource is not required for ERCOT reliability, the generation entity shall not terminate its registration of the generation resource with ERCOT unless it has transferred the generation resource to a generation entity that has a current resource entity agreement with ERCOT and the transferee registers that generation resource with ERCOT at the time of the transfer.

(1) Complaint with the commission. If, after 90 calendar days following ERCOT's receipt of the generation entity's notice, either ERCOT has not informed the generation entity that the generation resource is not needed for ERCOT reliability or both parties have not signed a reliability-must-run (RMR) agreement for the generation resource, then the generation entity may file a complaint with the commission against ERCOT, pursuant to §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct).

(A) The generation entity shall have the burden of proof.

(B) Pursuant to §22.251(d) of this title, absent a showing of good cause to the commission to justify a later deadline, the generation entity's deadline to file the complaint is 35 calendar days after the 90th calendar day following ERCOT's receipt of the notice.

(C) The dispute underlying the complaint is not subject to ERCOT's alternative dispute resolution procedures.

(D) In its complaint, the generation entity may request interim relief pursuant to §22.125 of this title (relating to Interim Relief), an expedited procedural schedule, and identify any special circumstances pertaining to the generation resource at issue.

(E) Pursuant to §22.251(f) of this title, ERCOT shall file a response to the generation entity's complaint and shall include as part of the response all existing, non-privileged documents that support ERCOT's position on the issues identified by the generation entity pursuant to §22.251(d)(1)(C) of this title.

(F) The scope of the complaint may include the need for the RMR service; the reasonable compensation and other terms for the RMR service; the length of the RMR service, including any appropriate RMR exit options; and any other issue pertaining to the RMR service.

(G) Any compensation ordered by the commission shall be effective the 91st calendar day after ERCOT's receipt of the notice. If there is a pre-existing RMR agreement concerning the generation resource, the compensation ordered by the commission shall not become effective until the termination of the pre-existing agreement, unless the commission finds that the pre-existing RMR agreement is not in the public interest.

(H) If the generation entity does not file a complaint with the commission, the generation entity shall be deemed to have accepted ERCOT's most recent offer as of the 115th calendar day after ERCOT's receipt of the notice.

(2) Out-of-merit-order dispatch. The generation entity shall maintain the generation resource so that it is available for out-of-merit-order dispatch instruction by ERCOT until:

(A) ERCOT determines that the generation resource is not required for ERCOT reliability;

(B) any RMR agreement takes effect;

(C) the commission determines that the generation resource is not required for ERCOT reliability; or

(D) a commission order requiring the generation entity to provide RMR service takes effect.

(3) RMR exit strategy. Unless otherwise ordered by the commission, the implementation of an RMR exit strategy pursuant to ERCOT Protocols is not affected by the filing of a complaint pursuant to this subsection.

(g) Noncompetitive constraints. ERCOT, through its stakeholder process, shall develop and submit for commission oversight and review protocols to mitigate the price effects of congestion on noncompetitive constraints.

(1) The protocols shall specify a method by which noncompetitive constraints may be distinguished from competitive constraints.

(2) Competitive constraints and noncompetitive constraints shall be designated annually prior to the corresponding auction of annual congestion revenue rights. A constraint may be redesignated on an interim basis.

(3) The protocols shall be designed to ensure that a noncompetitive constraint will not be treated as a competitive constraint.

(4) The protocols shall not take effect until after the commission has exercised its oversight and review authority over these protocols as part of the implementation of the requirements of §25.501 of this title (relating to Wholesale Market Design for the Electric Reliability Council of Texas) so that these protocols shall take effect as part of the wholesale market design required by that section. Any subsequent amendment to these protocols shall also be submitted to the commission for oversight and review, and shall not take effect unless ordered by the commission.

(h) System-wide offer cap. A supply offer shall not exceed $1,000/MWh or $1,000/MW/h. This offer cap shall be terminated on the date that the system-wide offer caps are implemented as required in §25.505(g)(6) of this title.

(i) Termination of MCSM. ERCOT shall terminate its use of the Modified Competitive Solution Method, ordered by the commission in Docket Number 24770, on October 1, 2006.

§25.504. Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

(a) Application. This section applies to all generation entities in the Electric Reliability Council of Texas (ERCOT). This section defines the term "market power," as that term is used in §25.503 of this title (relating to Oversight of Wholesale Market Participants).

(b) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context or specific language of a section indicates otherwise:

(1) Generation entity--An entity that controls a generation resource. An entity affiliated with a generation entity shall be considered part of that generation entity.

(2) Market power--The ability to control prices or exclude competition in a relevant market.

(3) Market power abuse--Practices by persons possessing market power that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition, including practices that tie unregulated products or services to regulated products or services or unreasonably discriminate in the provision of regulated services. Market power abuses include predatory pricing, withholding of production, precluding entry, and collusion.

(c) Exemption based on installed generation capacity. A single generation entity that controls less than 5% of the installed generation capacity in ERCOT, as the term "installed generation capacity" is defined in §25.5 of this title (relating to Definitions), excluding uncontrollable renewable resources, is deemed not to have ERCOT-wide market power. Controlling 5% or more of the installed generation capacity in ERCOT does not, of itself, mean that a generating entity has market power.

(d) Withholding of production. Prices offered by a generation entity with market power may be a factor in determining whether the entity has withheld production. A generation entity with market power that prices its services substantially above its marginal cost may be found to be withholding production; offering prices that are not substantially above marginal cost does not constitute withholding of production.

(e) Voluntary mitigation plan. Any generation entity may submit to the commission a mitigation plan for ensuring compliance with §25.503(g)(7) of this title or with the Public Utility Regulatory Act §39.157(a). Any plan that is submitted may be revised, with the agreement of the market participant, and approved or rejected by the commission. Adherence to a plan approved by the commission constitutes an absolute defense against an allegation of market power abuse with respect to behaviors addressed by the plan. Failure to adhere to a plan approved by the commission does not, of itself constitute a violation of §25.503(g)(7) of this title, but may be treated in the same manner as any other violation of a commission order.

§25.505. Resource Adequacy in the Electric Reliability Council of Texas Power Region

(a) General. The purpose of this section is to prescribe mechanisms that the Electric Reliability Council of Texas (ERCOT) shall establish to provide for resource adequacy in the energy-only market design that applies to the ERCOT power region. The mechanisms are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region, and to encourage market participants to take advantage of practices such as hedging, long-term contracting between market participants that supply power and market participants that serve load, and price responsiveness by end-use customers.

(b) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) Generation entity--an entity that owns or controls a generation resource.

(2) Load entity--an entity that owns or controls a load resource, including, but not limited to, a load acting as a resource (LaaR) or a balancing up load (BUL), as those terms are defined in the ERCOT Protocols.

(3) Resource entity--an entity that is a generation entity or a load entity.

(c) Statement of opportunities (SOO). ERCOT shall publish a SOO that provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities to reliably meet ERCOT's projected needs. A SOO published in even-numbered years shall use a ten-year study horizon and be published by December 31 of those years. A SOO published in odd-numbered years shall use a five-year study horizon and be published on or around October 1 of those years. ERCOT shall prescribe reporting requirements for generation entities and transmission service providers (TSPs) to report to ERCOT their plans for adding new facilities, upgrading existing facilities, and mothballing or retiring existing facilities. ERCOT also shall prescribe reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources.

(d) Projected assessment of system adequacy (PASA). Beginning no later than October 1, 2006, unless otherwise specified below, ERCOT shall provide market participants with information to assess the adequacy of resources and transmission facilities to meet projected demand in the following two reports:

(1) Each month, ERCOT shall publish a Medium-Term PASA for each week of the subsequent three years beginning with the week after the Medium-Term PASA is published. At a minimum, each Medium-Term PASA shall include the following information:

(A) Load forecast by ERCOT zone or area;

(B) Ancillary service requirements;

(C) Transmission constraints; and

(D) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(2) Each day, ERCOT shall publish a Short-Term PASA for each hour for the seven days beginning with the day the Short-Term PASA is published.

(A) At a minimum, each Short-Term PASA shall include the following information:

(i) Load forecast by ERCOT zone or area;

(ii) Ancillary service requirements;

(iii) Transmission constraints; and

(iv) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(B) By October 1, 2006, ERCOT shall file at the commission a plan to incorporate the impact of transmission constraints into its Short-Term PASA at a later date.

(e) Filing of resource and transmission information with ERCOT. ERCOT shall prescribe reporting requirements for resource entities and TSPs for the preparation of PASAs. At a minimum, the following information shall be reported to ERCOT:

(1) TSPs shall provide ERCOT with information on planned and existing transmission outages.

(2) Generation entities shall provide ERCOT with information on planned and existing generation outages.

(3) Load entities shall provide ERCOT with information on planned and existing availability of LaaRs, specified by type of ancillary service, and BULs.

(4) Generation entities shall provide ERCOT with a complete list of generation resource availability and performance capabilities, including, but not limited to:

(A) the net dependable capability of generation resources;

(B) projected output of non-dispatchable resources such as wind turbines, run-of-the-river hydro, and solar power; and

(C) output limitations on generation resources that result from fuel or environmental restrictions.

(5) Load serving entities (LSEs) shall provide ERCOT with complete information on load response capabilities that are self-arranged or pursuant to bilateral agreements between LSEs and their customers.

(f) Publication of resource and load information in ERCOT markets. To increase the transparency of the ERCOT-administered markets, ERCOT shall post at a publicly accessible location on its website, beginning no later than October 1, 2006, the information required pursuant to this subsection.

(1) The following information in aggregated form, for each settlement interval and for each area where available, shall be posted two calendar days after the day for which the information is accumulated.

(A) Quantities and prices of offers for energy and each type of ancillary capacity service, in the form of supply curves.

(B) Self-arranged energy and ancillary capacity services, for each type of service.

(C) Actual resource output.

(D) Load and resource output for all entities that dynamically schedule their resources.

(E) During the operation of the market under a zonal market design, scheduled load and actual load. During the operation of the market under a nodal market design, firm scheduled load, scheduled load with "up to" limits on congestion charges, and actual load.

(2) During the operation of the market under a nodal market design, the following day-ahead market information in aggregate form shall be posted two calendar days after the day for which the information is accumulated: load bids, including virtual loads, in the form of day-ahead bid curves, and cleared load.

(3) The following information in entity-specific form, for each settlement interval, shall be posted as specified below.

(A) During the operation of the market under a zonal market design:

(i) Portfolio offer curves for balancing energy and for each type of ancillary service, for each area where available, shall be posted 30 days after the day for which the information is accumulated beginning October 1, 2006, except that, for the highest-priced offer selected or dispatched by ERCOT for each interval, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated. In the event of interzonal congestion, ERCOT shall post, separately for each zone, the offer price and the name of the entity submitting the highest-priced offer selected or dispatched.

(ii) Other offer-specific information for each type of service and for each area where available shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, this information shall be posted 60 days after the day the information was accumulated. The information subject to this disclosure requirement is as follows:

(I) final energy schedules for each QSE;

(II) final ancillary services schedules for each QSE;

(III) resource plans for each QSE representing a resource;

(IV) actual output from each resource; and

(V) all dispatch instructions from ERCOT for balancing energy and ancillary services.

(iii) The information posted shall include the names of the resources in the portfolio that were committed, the name of the entity submitting the information, the name of the entity controlling each resource in the portfolio.

(B) Two months after the start of operation of the market under a nodal market design:

(i) Offer curves (prices and quantities) for each type of ancillary service and for energy at each settlement point in the real time market, shall be posted 30 days after the day for which the information is accumulated except that, for the highest-priced offer selected or dispatched for each interval on an ERCOT-wide basis, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated.

(ii) Other resource-specific information, as well as self-arranged energy and ancillary capacity services, and actual resource output, for each type of service and for each resource at each settlement point shall be posted 30 days after the day for which the information is accumulated.

(iii) The posted information shall be linked to the name of the resource (or identified as a virtual offer), the name of the entity submitting the information, and the name of the entity controlling the resource. If there are multiple offers for the resource, ERCOT shall post the specified information for each offer for the resource, including the name of the entity submitting the offer and the name of the entity controlling the resource.

(C) The load and generation resource output for each zone, for each entity that dynamically schedules its resources, shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, the information required by this subparagraph shall be posted 60 days after the day for which the information is accumulated. Two months after the start of operation of the market under a nodal market design, the information required by this subparagraph shall be posted 30 days after the day for which the information is accumulated.

(D) ERCOT shall use §25.502(e) of this title (relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas) as the basis for determining the control of a resource and shall include this information in its market operations data system.

(g) Scarcity pricing mechanism (SPM). ERCOT shall administer the SPM. The SPM shall take effect on January 1, 2007, unless the commission by order changes this date. The SPM shall operate as follows:

(1) The SPM shall operate on an annual resource adequacy cycle, starting on January 1 and ending on December 31 of each year.

(2) For each day of the annual resource adequacy cycle, the peaking operating cost (POC) shall be 10 times the daily Houston Ship Channel gas price index for the previous business day. The POC is calculated in dollars per megawatt-hour (MWh).

(3) For the purpose of this section, the real-time energy price (RTEP) shall be measured as the price at an ERCOT-calculated ERCOT-wide hub.

(4) In the annual resource adequacy cycle, the peaker net margin (PNM) shall be calculated as:
Figure: 16 TAC §25.505(g)(4)

(5) Each day ERCOT shall post at a publicly accessible location on its website the updated value of the PNM, in dollars per megawatt (MW).

(6) The system-wide offer caps shall be as follows:

(A) The low system offer cap (LCAP) shall be set on a daily basis at the higher of:

(i) $500 per MWh and $500 per MW per hour; or

(ii) 50 times the daily Houston Ship Channel gas price index of the previous business day, expressed in dollars per MWh and dollars per MW per hour.

(B) Beginning March 1, 2007, the high system-wide offer cap (HCAP) shall be $1,500 per MWh and $1,500 per MW per hour.

(C) Beginning March 1, 2008, the HCAP shall be $2,250 per MWh and $2,250 per MW per hour.

(D) Beginning two months after the opening of the nodal market, the HCAP shall be $3,000 per MWh and $3,000 per MW per hour.

(E) At the beginning of the annual resource adequacy cycle, the system-wide offer cap shall be set equal to the HCAP and, except for increases authorized in this section, maintained at this level as long as the PNM during an annual resource adequacy cycle is less than or equal to $175,000 per MW. During an annual resource adequacy cycle, the system-wide offer cap shall be increased in accordance with the schedule authorized in this section unless the PNM has been exceeded by that date. If the PNM exceeds $175,000 per MW during an annual resource adequacy schedule, the system-wide offer cap shall be reset at the LCAP for the remainder of that annual resource adequacy cycle.

(F) The Independent Market Monitor, as part of its responsibilities pursuant to Public Utility Regulatory Act §39.1515(h), may conduct an annual review of the effectiveness of the SPM.

(h) Development and implementation. ERCOT shall use a stakeholder process to develop protocols that comply with this section. Nothing in this section prevents the commission from taking actions necessary to protect the public interest, including actions that are otherwise inconsistent with the other provisions in this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604691
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 13, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 25. TEXAS STRUCTURAL PEST CONTROL BOARD

CHAPTER 595. COMPLIANCE AND ENFORCEMENT

22 TAC §595.7

The Texas Structural Pest Control Board adopts an amendment to 22 TAC §595.7 concerning Consumer Information Sheet without changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5748).

Justification for the adopted rule is to incorporate the name change for National Pesticide Information Center and updates the names for state agencies.

The adopted rule will function by having paperwork reflect the correct name for matters relating to pesticide poisoning in Board documents.

No comments were received.

The amendment is adopted under the Structural Pest Control Act, Chapter 1951 of the Occupations Code, which provides the Texas Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 28, 2006.

TRD-200604776
Murray Walton
Executive Director
Texas Structural Pest Control Board
Effective date: September 17, 2006
Proposal publication date: July 21, 2006
For further information, please call: (512) 305-8270

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 97. COMMUNICABLE DISEASES

SUBCHAPTER K. RESPIRATORY SYNCYTIAL VIRUS

25 TAC §§97.251 - 97.257

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §§97.251 - 97.257, concerning Respiratory Syncytial Virus (RSV) without changes to the proposed text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3158) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The new rules comply with Health and Safety Code, Chapter 96 "Respiratory Syncytial Virus" (House Bill 1677, 79th Legislature, Regular Session, 2005), which requires the department to establish a sentinel surveillance program for RSV that will identify RSV infection in children and maintain data that can be used to investigate incidence, prevalence, and trends of RSV. The department is required by the statute to specify a system for selecting the demographic areas in which the department will collect information, and prescribe the manner in which data are reported to the department.

The department carefully considered the best way to reconcile the purposes of the statute to select accurate, representative sources of data; to investigate the incidence prevalence and trends of RSV; while minimizing impact on providers. The department believes these rules best serve these purposes.

SECTION-BY-SECTION SUMMARY

New §97.251 provides definitions for the new subchapter; new §97.252 outlines confidentiality requirements; new §97.253 provides information regarding the limitation of liability for health professionals, health facilities, administrators, officers, or employees of a health facility that provides information as outlined in the new subchapter; new §97.254 requires the cooperation of governmental entities to assist the department in carrying out the new subchapter; new §97.255 establishes the sentinel surveillance program at the department; new §97.256 outlines the process the department will use for RSV data collection; and new §97.257 states that the information collected by the department regarding RSV infection may be placed in a central database to facilitate information sharing and provider education.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Cathy Campbell, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new sections are authorized by the Health and Safety Code, §96.005, which requires the Executive Commissioner of the Health and Human Services Commission to establish in the department a sentinel surveillance program for RSV infection; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department, and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604773
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: September 14, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 458-7111 x6972

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER F. REPTILE-ASSOCIATED SALMONELLOSIS

25 TAC §169.121

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §169.121, concerning warnings retail pet stores must provide relating to reptile-associated salmonellosis without changes to the proposed text as published in the June 23, 2006, issue of the *Texas Register* (31 TexReg 5010) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The adopted amendment is necessary to comply with Health and Safety Code, Chapter 81, Subchapter I, "Animal-Borne Diseases," which requires retail pet stores to post signs and distribute warnings relating to reptile-associated salmonellosis to purchasers of reptiles. The signs and warnings are to be in accordance with the form and content designated by the department.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.121 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The adopted amendment to §169.121 is necessary to comply with the mandated four-year rule review; update the legacy agency name; and make the rules for warning signs consistent with the Centers for Disease Control and Prevention (CDC) recommendations to prevent transmission of salmonellosis from reptiles to humans.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is adopted under the Health and Safety Code, §81.352, which requires the department to adopt a rule governing the form and content of the sign and written warning relating to reptile-associated salmonellosis; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department, and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604766
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: September 14, 2006
Proposal publication date: June 23, 2006
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER G. CAGING REQUIREMENTS AND STANDARDS FOR DANGEROUS WILD ANIMALS

25 TAC §169.131

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §169.131, concerning caging requirements and standards for the keeping and confinement of dangerous wild animals without changes to the proposed text as published in the June 23, 2006, issue of the *Texas Register* (31 TexReg 5012) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The adopted amendment is necessary to comply with Health and Safety Code, Chapter 822, Subchapter E, "Dangerous Wild Animals", which requires owners of a dangerous wild animal to keep and confine the animal in accordance with the caging requirements and standards established by the department.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.131 has been reviewed

and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The adopted amendment to §169.131 is necessary to comply with the mandated four-year rule review; provide for a safe, healthy and humane environment for the animals; prevent escape by the animals; and clarify the minimum caging requirements relating to the structures and outdoor facilities containing dangerous wild animals.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is adopted under the Health and Safety Code, §822.111, which requires the department to adopt a rule establishing the caging requirements and standards for the keeping and confinement of dangerous wild animals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department, and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604771
Cathy Campbell
General Counsel
Department of State Health Services
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Proposal publication date: June 23, 2006
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE

The Texas Commission on Environmental Quality (commission) adopts amendments to §§37.271, 37.371, and 37.8011 *without changes* to the proposed text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2391). These sections will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 2131, 79th Legislature, 2005, amended Texas Health and Safety Code (THSC), Chapter 361, Subchapter C, by adding §361.0855 to allow political subdivisions or quasi governmental entities to rely on their own financial strength to demonstrate financial assurance. Under prior law, a municipality that owned a municipal solid waste (MSW) landfill could satisfy the requirements to demonstrate financial assurance by using a local government financial test; however, other political subdivisions, such as local government corporations and conservation and reclamation districts, could not.

SECTION BY SECTION DISCUSSION

Administrative changes have been made throughout the rules to be consistent with Texas Register requirements and agency guidelines.

Adopted §37.271, Local Government Financial Test, expands the types of bonds that can be used by MSW landfills to pass the local government financial test. Bonds that can be used to pass the local government financial test now include revenue bonds and certificates of obligation as well as general obligation bonds.

Adopted §37.371, Local Government Financial Test, adds revenue bonds and certificates of obligation to the letter signed by the local government's chief financial officer required as part of the local government financial test.

Adopted §37.8011, Definitions, expands the definition of "Local government" by adding a phrase that clarifies that local government includes both a local government corporation created under Texas Transportation Code, Chapter 431, to act on behalf of local government and a conservation and reclamation district created under Texas Constitution, Article XVI, §59. The adopted rule also adds the definition of "Bonds." To make the definition section easier to read, the section was divided into paragraph (1) for "Local government" and paragraph (2) for "Bonds."

The commission is not recommending any change to Chapter 37 to incorporate THSC, §361.0855 statutory requirements that a local government pass a financial test, demonstrate that its outstanding bonds be unsecured, and meet a minimum rating because these requirements already exist under §37.271.

The commission made no change to the rules related to the language about the submission of a local government's demonstration of financial assurance. The requirement under THSC, §361.0855, that a local government must demonstrate financial assurance under this section before the initial receipt of waste is covered under §37.31, which requires that a financial assurance mechanism must be in effect before the initial receipt of waste. The requirement under THSC, §361.0855, that a local government must demonstrate financial assurance under this section as soon as practicable for operating facilities does not need to be included in the adopted rules because all facilities operating on the effective date of THSC, §361.0855, are required to provide financial assurance under existing state and federal requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule that is specifically intended to protect the environment or to reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, pro-

ductivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules are intended to implement new legislation to allow certain governmental entities other methods to meet financial assurance requirements. In fact, the adopted rulemaking revises the commission's rules in a manner that could provide a benefit to the economy while maintaining the same level of protection of the environment and public health and safety. Because the existing rules require financial assurance for protection of human health and the environment, this adopted rulemaking does not decrease the protection of the environment or human health.

The 79th Legislature passed HB 2131, which amended THSC, Chapter 361, Subchapter C, by adding §361.0855. The law expands the definitions of "Bonds" and "Local governments" in relation to MSW landfills owned and operated by local governments using a financial test for financial assurance. Under prior law, a municipality that owned an MSW landfill could satisfy the requirements to demonstrate financial assurance by using a local government financial test; however, it did not state whether other political subdivisions, such as local government corporations and conservation and reclamation districts, could demonstrate financial assurance in this same manner. In order to implement HB 2131, the adopted rulemaking expands the definition of "Local government" to include these political subdivisions, making them eligible to use a local government financial test to demonstrate financial assurance and defining the types of bonds that may be used as part of the local government financial test. Therefore, it is not anticipated that the adopted rulemaking will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. In fact, the adopted rules should benefit the economy and productivity by producing annual savings for fees currently paid to provide financial assurance instruments. The commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

Furthermore, the adopted rules do not meet any of the four applicability requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these criteria. First, federal authority (40 Code of Federal Regulations (CFR) Part 258, Subpart G) on the issue of financial assurance has been delegated to the state, and the Texas Legislature has enacted statutes that are consistent with the federal requirements. Both state and federal statutes require financial assurance for MSW facilities (THSC, §361.085(e) and §361.0855, and 40 CFR Part 258). The adopted rules are intended to implement new legislation to allow certain governmental entities other methods to meet financial assurance requirements. Therefore, the adopted rulemaking does not exceed a standard set by federal regulations because the rules implement new state statutes that are consistent with the federal regulations. Second, the adopted rulemaking carries out the general state statutes that require financial assurance, and does not exceed an express requirement of state law. Third, adopted rules do not exceed the requirements of a delegation agreement between the state and an agency of the federal government to implement a state or federal program. The adopted rules are consistent with the corresponding federal financial assurance requirements. Fourth, the commission adopts these rules under new specific state law, in THSC, §361.0855. Therefore, the commission does not adopt the amendments solely under the commission's general powers.

The commission solicited public comment on the draft regulatory impact analysis in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2392). No comments were received concerning the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for these adopted rules in accordance with Texas Government Code, Chapter 2007. The principal intent of this adopted rulemaking is to amend Chapter 37 to meet new statutory requirements by revising and clarifying sections relating to financial assurance requirements.

This adopted rulemaking implements THSC, §361.0855, which was created by HB 2131. The commission's final assessment indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rulemaking because it is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). Chapter 37 implements the state requirements found in THSC, §361.085 and §361.0855.

Nevertheless, the commission further evaluated the adopted rulemaking and performed a final assessment of whether the adopted rulemaking constitutes a takings under Texas Government Code, Chapter 2007. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the adopted rules will not burden private real property, restrict or limit the owner's right to property, or reduce its value by 25% or more beyond what will otherwise exist in the absence of these regulations. Rather, the adopted rules only revise and clarify financial assurance requirements. Therefore, the adopted rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the CMP.

PUBLIC COMMENT

The commission solicited public comment in the March 24, 2006, issue of the *Texas Register*. A written comment was received from Russell & Rodriguez, L.L.P., a law firm representing North Texas Municipal Water District and Texoma Area Solid Waste Authority, Inc.

RESPONSE TO COMMENTS

Russell & Rodriguez L.L.P., a law firm representing North Texas Municipal Water District and Texoma Area Solid Waste Authority,

commented that the new definition of "Local government," which now includes local government corporations, should be revised to specifically recognize local government corporations created to "act on behalf of one or more local governments" rather than "a local government," as proposed.

The commission declines to make the proposed change. The commission notes that the enabling statute references Texas Transportation Code, Chapter 431, and that code includes the words "one or more local governments." Therefore, the commission interprets the phrase "a local government" to be inclusive of one or more local governments. The commission chooses to follow the language of the enabling statute. Accordingly, no change was made to the proposed text in response to these comments.

SUBCHAPTER C. FINANCIAL ASSURANCE MECHANISMS FOR CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION

30 TAC §37.271

STATUTORY AUTHORITY

The amended section is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of the state. The rule is also adopted under THSC, Texas Solid Waste Disposal Act, §361.011, which provides the commission with the authority to manage municipal solid waste; §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties, and to establish standards of operation for the management of solid waste; and §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste and permitted facilities. Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under the laws of Texas and to establish and approve all general policy of the commission.

The amended rule is also adopted in accordance with THSC, §361.0855, implementing HB 2131, 79th Legislature, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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SUBCHAPTER D. WORDING OF THE MECHANISMS FOR CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION

30 TAC §37.371

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of the state. The rule is also adopted under THSC, Texas Solid Waste Disposal Act, §361.011, which provides the commission with the authority to manage municipal solid waste; §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties, and to establish standards of operation for the management of solid waste; and §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste and permitted facilities. Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under the laws of Texas and to establish and approve all general policy of the commission.

The amended rule is also adopted in accordance with THSC, §361.0855, implementing HB 2131, 79th Legislature, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. FINANCIAL ASSURANCE FOR MUNICIPAL SOLID WASTE FACILITIES

30 TAC §37.8011

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of the state. The rule is also adopted under THSC, Texas Solid Waste Disposal Act, §361.011, which provides the commission with the authority to manage municipal solid waste; §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties, and to establish standards of operation for the management of solid waste; and §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste and permitted facilities. Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under the laws of Texas and to establish and approve all general policy of the commission.

The amended rule is also adopted in accordance with THSC, §361.0855, implementing HB 2131, 79th Legislature, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.35

The Texas General Land Office (GLO) adopts an amendment to §15.35 relating to Certification Status of Galveston County Dune Protection and Beach Access Plan (Plan) without changes to the proposed text as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1903) and the text of the rule as amended will not be republished. The Galveston County Commissioners' Court adopted by order an amended and restated version of the Plan on January 18, 2006. The amendment to §15.35 certifies that the amended and restated version of the Plan is consistent with state law.

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§15.1 - 15.10, 15.12, 15.21 - 15.36), a local government with jurisdiction over Gulf beaches must submit its dune protection and beach access plan and any amendments to such a plan to the GLO for certification. 31 TAC §15.3(o). The GLO reviews a local beach access and dune protection plan and, if appropriate, certifies that the plan is consistent with state law by adoption or amendment of a rule as authorized in Texas Natural Resources Code, §61.011(d)(5). The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO. 31 TAC §15.3(o)(4).

Galveston County (County) originally adopted a dune protection and beach access plan on August 16, 1993 (1993 Plan). The County submitted the 1993 Plan to the GLO. The GLO conditionally certified the 1993 Plan, which has been in force continuously to the present day. By order of the Commissioners' Court, the County adopted a revised dune protection and beach access plan on October 25, 2004. An amended and restated version of the 2004 plan was adopted by order of the County's Commissioners' Court on January 18, 2006 (Plan). As of the current date, the County's Plan can be viewed on the County's website at http://www2.co.galveston.tx.us/dunes/dunes_project_select.htm.

New §15.35(a) eliminates the language stating that the certification of the Plan is conditional, and states that the amended Plan is consistent with state law. New §15.35(b) certifies that the "fibercrete" variance requested by the County relating to special dune protection standards for eroding areas in Section II(L) and Section III(A)(2)(i) of the Plan is consistent with state law. New §15.35(c) certifies that the variance from the Beach/Dune Rules relating to the construction of cisterns, septic tanks, and septic fields seaward of a structure under certain conditions in Section III(A)(2)(k) of the Plan is consistent with state law.

The Gulf beaches governed by the Plan are those within the County on the beaches on Bolivar Peninsula and the following areas on Galveston Island: (1) The unincorporated Pirates' Beach subdivision; and (2) four County beach parks: (i) Beach Pocket Park #1 at 7-1/2 Mile Road and FM 3005 (Pocket Park #1); (ii) Frank Carmona Pocket Park #2 at 9-1/2 Mile Road and FM 3005 (Pocket Park #2); (iii) Beach Pocket Park #3 at 11 Mile Road and FM 3005 (Pocket Part #3), and (iv) Beach Pocket Park #4 at 22 Mile Road and FM 3005 (Pocket Park #4). The Gulf beaches within the corporate limits of the City of Galveston are governed by the City of Galveston Dune Protection and Beach Access Plan (City's Plan), certified in part and conditionally certified in part in 31 TAC §15.36. The text of the City's plan and related documents can be viewed on the City's website at http://www.cityofgalveston.org/pdf/04p72stf.pdf. The Gulf beaches within the corporate limits of the City of the Village of Jamaica Beach are governed by the Village of Jamaica Beach Dune Protection and Beach Access Plan, certified as consistent with state law in 31 TAC §15.29.

On August 16, 1993, the Commissioners' Court of Galveston County issued an order adopting the Galveston County Dune Protection and Beach Access Plan for Bolivar Peninsula and Unincorporated Areas of Galveston Island (1993 Plan) that is currently in force. The County submitted the 1993 Plan to the GLO with a request for certification in accordance with state law. In response to that request, the GLO amended to Beach/Dune Rules to provide that the 1993 Plan is "conditionally certified . . . until the county amends its plan according to the comments provided by the General Land Office to the county on October 18, 1993, or until the General Land Office officially revokes the conditional certification." 31 TAC §15.35.

Over the intervening years since the 1993 Plan was conditionally certified, the GLO and the County have maintained an ongoing dialogue concerning various proposed changes to the 1993 Plan that would warrant unconditional certification. Much of that dialogue has focused on certain changes necessary to satisfy the requirements of state law, particularly with respect to the DPL. The 1993 Plan has provided that the DPL is 50 feet landward of the line of vegetation, except in areas where critical dunes lie landward of 50 feet, in which case the DPL lies landward of such critical dunes areas. This ambiguous DPL has been an overriding concern of the GLO in discussing amendments to the County's plan.

On October 25, 2004, the Commissioners' Court of Galveston County adopted amendments to the 1993 Plan and submitted those amendments to the GLO with a request for certification. The amended plan included, among other changes, a dune protection line fixed at 200 feet landward of the line of vegetation on Bolivar Peninsula. It also included amended beach user fees for areas on Galveston Island, as well as a new beach user fee for Bolivar Peninsula, imposed as a $10 annual parking sticker for parking on Bolivar beaches. The GLO responded to the County's request for certification with comments concerning several aspects of the October 25, 2004, amendments that were not consistent with state law. After months of discussion with the GLO and several field inspections of critical dune areas, the County made additional amendments to the 1993 Plan, adopting an amended and restated version of the October 25, 2004 amendments on January 18, 2006 (2006 Plan).

The 2006 Plan includes a number of notable changes from the 1993 Plan: (1) The DPL is established at 200 feet landward of the line of vegetation on Bolivar Peninsula, except for areas on the western end, where the DPL is delineated by metes and bounds, reflecting a line landward of all critical dune areas identified by the GLO and the County after several mutual field inspections; (2) The 2006 Plan authorizes a new beach user fee for Bolivar Peninsula only, which will require a parking sticker for vehicles to park on Bolivar Peninsula beaches at a cost of $10.00 annually. Additional parking fees are authorized at Pocket Parks #2 and #3 on Galveston Island (no fee is imposed at Pocket Parks #1 and #4); (3) a special standard is adopted for construction in eroding areas providing that unreinforced fibercrete may be used for the footprint of a habitable structure and a driveway under certain conditions; (4) under certain conditions, construction of cisterns, septic tank, and septic field on previously existing, permitted, or platted lots may be placed seaward of a structure provided that they do not encroach on the public beach.

The 2006 Plan also updates the description of beach access points. A detailed designation of the beach accessways on Bolivar Peninsula and the unincorporated areas of Galveston Island can be found in Section V(B)(1) of the 2006 Plan, with maps included at Appendices 5 and 6.

The GLO reviewed information provided by the County by letters dated November 1, 2004, January 4, 2005, and January 24, 2005, in support of its request to impose its beach user fee plan as required by 31 TAC §15.8(d), together with beach user fee revenue reports required by 31 TAC §15.8(f). Based on the information provided by the County, the GLO has determined that the fee requested is reasonable in that it does not exceed the necessary and actual cost of providing reasonable beach-related facilities and services, does not unfairly limit public use of and access to and from public beaches in any manner, and is consistent with §15.8 of the Beach/Dune Rules and the Open Beaches Act.

Section 15.8 of the Beach/Dune Rules requires that local governments within a county adopt a state-approved system of reciprocity of beach users fees and fee privileges as a condition of certification of plan amendments. The 2006 Plan addresses the reciprocity requirement in Section VI (A)(6) and Section VI(E). The Park Board of Trustees for the City of Galveston currently manages the City's beach parks as well as the County's Pocket Parks on Galveston Island. The County, the City of Galveston, and the Park Board of Trustees for the City of Galveston entered into an InterLocal agreement on July 26, 2006 that describes their system of reciprocity (2006 InterLocal Agreement).

Section II, paragraph 2 of the Interlocal Agreement provides the following agreement regarding beach user fees to be imposed among the three entities:

Parking fees. The County agrees that it shall not impose or attempt to impose the fees established in its 1993 County Dune Protection and Beach Access Plan for parking at Pocket Parks 1, 2, and 3 while such plan remains effective and shall not impose or attempt to impose the fees established in the County Dune Protection and Beach Access Plan as Amended (upon its certification) for parking at Pocket Parks 2 and 3, so long as the Park Board retains operation of Pocket Parks 1, 2, and 3 pursuant to the InterLocal agreement between the County and the Park Board entered into on December 27, 2004, relating to various beach-related services provided by the Park Board for County beaches on Galveston Island. Accordingly, fees for parking on Galveston Island within the City incorporated limits, including the Pocket Parks as specified herein, shall be pursuant to the City Dune Protection and Beach Access Plan as Amended. Fees for parking on the beach on Bolivar Peninsula shall be pursuant to the County Dune Protection and Beach Access Plan as Amended, upon its certification, and the City and the Park Board each agree that they, singly and/or jointly, shall not impose or attempt to impose the fees established in the City Dune Protection and Beach Access Plan as Amended for parking on the beach on Bolivar Peninsula.

The GLO has reviewed the system of reciprocity set forth in the 2006 InterLocal Agreement. The GLO finds that the system fulfills the requirements of 31 TAC §15.8. The County and the City, the two local governments in Galveston County that charge beach user fees, are parties to the 2006 Interlocal Agreement. The system of reciprocity clearly delineates the fees that will be imposed at each location affected by the Plan. The system eliminates ambiguity that might arise between the County's Plan and the City's Plan and avoids possible confusion. Therefore, the GLO approves the system of reciprocity reflected in the 2006 Interlocal Agreement.

The General Land Office certifies as consistent with state law the following variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of Beach/Dune Rules (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards) in the County's plan. The plan establishes special standards for eroding areas providing that: (1) paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the landward toe of the back dune; (2) paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in maximum of 4 foot x 4 foot sections, which shall be a maximum of four inches thick with sections separated by expansion joists or pervious materials approved by the County Building Official, in that area 25 feet from the landward toe of the back dune to 200 feet landward of the line of vegetation; a "Fibercrete Maintenance fee" of $200.00 shall be assessed by the County to be used to pay for the clean-up of fibercrete from the public beaches should the need arise; and reinforced concrete may be used in that area landward of 200 feet from the line of vegetation to alter or pave only the ground within the footprint of the habitable structure.

The reasoned justification submitted by the County in support of its request for the variance authorizing the use of fibercrete in eroding areas within 200 feet seaward of the line of vegetation suggests that it provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that: (1) financial assurance for debris removal and beach clean-up through imposition of the maintenance fee; (2) debris removal and beach clean-up are facilitated by the use of unreinforced fibercrete in large 4 foot x 4 foot sections rather than small pavers, with less sand removed from the beach during clean-up; (3) the 4 foot x 4 foot sections of fibercrete help with wind-load requirements for windstorm and FEMA regulations by shifting the point of movement in pilings during a storm from below grade level without fibercrete to grade where fibercrete is present; and (4) prohibiting the use of fibercrete in the area between the line of vegetation and 25 feet from the landward toe of the back dune ensures that dune hydrology are not adversely affected.

The General Land Office certifies as consistent with state law the following variances from §15.4(c)(10) of the Beach/Dune

Rules (relating to Dune Protection Standards) in the County's Plan. The 2006 Plan prohibits the construction of cisterns, septic tanks, and septic fields seaward of any structure serviced by the cisterns, septic tanks, and septic fields, except that: (1) cisterns, septic tanks, and septic fields which are in existence prior to the effective date of the 2006 Plan may be repaired or replaced; (2) cisterns, septic tanks, and septic fields that are located in subdivisions platted before the effective date of the 2006 Plan and permitted before the effective date of the 2006 Plan may be constructed, repaired, or replaced; and (3) cisterns, septic tanks, and septic fields in cisterns, septic tanks, and septic fields that are located in subdivisions platted before the effective date of the 2006 Plan may be constructed, repaired, or replaced in a location seaward of the structure they are to serve provided that the applicant shows that it is not practicable to locate the cisterns, septic tanks, and septic fields landward of the structure they are to serve. The County's Plan provides that in all cases such cisterns, septic tanks, and septic fields may not encroach on the public beach and further provides procedures and criteria for determining practicability and an appeals procedure for such determination.

The reasoned justification submitted by the County in support of its request for the variance authorizing cisterns, septic tanks, and septic fields to be constructed, repaired, or replaced in a location seaward of the structure they are to serve in limited circumstances suggests that it provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach. The variance affords respect for previously acquired property rights and limits the exception to those circumstances where there is no practicable alternative to location of the cisterns, septic tanks, and septic fields in cisterns, septic tanks, and septic fields landward of the structures they serve. The procedures and criteria for determining practicability and an appeals procedure for such determination outlined in the 2006 Plan ensure construction of cisterns, septic tanks, and septic fields in a manner that protects dunes, dune vegetation, and public access to and use of the beach to the greatest extent practicable with the Beach/Dune Rules, while at the same time allowing development of property in a manner that complies with local, state, and federal regulations and statutes concerning on-site sewage facilities.

The GLO finds that the adopted amendments to the Plan provide an equal or better level of protection of dunes, dune vegetation, and public access to and use of the public beach. The newly established dune protection line removes an ambiguity from the former plan and provides better protection for critical dune areas. Accordingly, the GLO certifies the amendment to the Galveston County Dune Protection and Beach Access Plan, adopted by the Galveston County Commissioners' Court on January 18, 2006, as consistent with the Open Beaches Act, the Dune Protection Act, and the Beach/Dune Rules. Certification of the Plan shall not be considered in any manner as a waiver of rights of the GLO concerning any previous failure by Galveston County to comply with its certified plan, the Open Beaches Act, the Dune Protection Act, and the Beach/Dune Rules.

The amendment to §15.35 concerning Certification Status of Galveston County Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP. The Land Office has reviewed these adopted actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.26, relating to Policies for Construction in the Beach/Dune System, and §501.27, relating to Policies for Development in Coastal Hazard Areas. The adopted rulemaking actions are consistent with the Land Office's Beach/Dune Rules that the Council has determined to be consistent with the CMP. Consequently, the Land Office has determined that the adopted rulemaking actions are consistent with applicable CMP goals and policies.

No comments were received on the adopted amended and restated Plan or its consistency with the CMP goals and policies.

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rulemaking implements legislative requirements in Texas Natural Resources Code, §§61.011, 61.015(b), and 61.022(c), which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law.

The amendments are adopted under Texas Natural Resources Code, Chapter 61, §61.011(d), which authorizes the GLO to adopt rules related to the certification of beach access and use plans; §61.015(b), which provides that certification of local government plans shall be by adoption into the beach/dune rules; and §61.022(c), which requires the GLO to certify the consistency of vehicular plans and fees by adoption into the beach/dune rules.

Texas Natural Resources Code, §§61.011, 61.015, 61.022, and 61.070 are affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2006.

TRD-200604716
Trace Finley
Policy Director
General Land Office
Effective date: September 13, 2006
Proposal publication date: March 17, 2006
For further information, please call: (512) 463-6311

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 63. BOARD OF TRUSTEES

34 TAC §63.3

The Employees Retirement System of Texas ("ERS") adopts amendments to 34 Texas Administrative Code §63.3, concerning Election of Trustees (Nomination Process), without changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5772). The adopted amendments concern the election of trustees, and change the guidelines for the petitions that are required in order for interested parties to qualify themselves as candidates for the ERS Board of Trustees election.

Section 63.3(2) changes the information required for the petitions needed to qualify candidates for the ERS Trustee election. Previously, the rule required that eligible voters provide their signature, printed name and full social security number on the petition in order for the signature to be valid. The adopted rule requires the signature, printed name, ZIP code and only the last four digits of the social security number in order for the signature to be valid. The adopted rule also provides that if a person signs more than one petition, that person's signature may not be counted on any petition. These adopted amendments will ensure that future trustee elections will be administered in a more effective manner, and the privacy of persons signing these petitions will be better protected.

No comments were received on the proposed amendments.

The amendments are adopted under the Government Code, §815.003 and §815.102, which provide authorization for the Board to adopt rules necessary to nominate and elect trustees and to carry out other business of the Board. The adopted amendments do not affect any other statutes, articles, or codes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604765
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: September 14, 2006
Proposal publication date: July 21, 2006
For further information, please call: (512) 867-7421

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CHAPTER 67. HEARINGS ON DISPUTED CASES

34 TAC §§67.1, 67.3, 67.5, 67.7, 67.9, 67.11, 67.13, 67.15, 67.17, 67.19, 67.21, 67.23, 67.25, 67.27, 67.31, 67.33, 67.35, 67.37, 67.39, 67.41, 67.43, 67.45, 67.47, 67.49, 67.51, 67.53, 67.55, 67.57, 67.61, 67.63, 67.65, 67.69, 67.71, 67.73 - 67.75, 67.77, 67.79, 67.81, 67.83, 67.85, 67.87, 67.89, 67.91, 67.93, 67.95, 67.97, 67.99, 67.101, 67.103, 67.105, 67.107 - 67.109

The Employees Retirement System of Texas ("ERS") adopts amendments to 34 TAC, Chapter 67, concerning Hearings on Disputed Claims. New §§67.74 and 67.108, as well as amended §§67.1, 67.3, 67.7, 67.9, 67.11, 67.13, 67.15, 67.17, 67.19, 67.21, 67.23, 67.25, 67.27, 67.31, 67.33, 67.35, 67.37, 67.39, 67.41, 67.43, 67.45, 67.47, 67.49, 67.51, 67.53, 67.55, 67.57, 67.61, 67.63, 67.65, 67.69, 67.71, 67.73, 67.75, 67.77, 67.79, 67.81, 67.83, 67.85, 67.87, 67.91, 67.93, 67.95, 67.97, 67.99, 67.101, 67.105, 67.107, and 67.109 are adopted without changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5773).

Sections 67.5, 67.89 and 67.103 are adopted with changes to the proposed text as published in the *Texas Register*, in order to correct nonsubstantive publication errors. In §67.5(a), the proposed new text appeared twice; in §67.89(a), a closed parenthesis was omitted; and in §67.103(c)(2), the opening parenthesis was placed incorrectly.

The new and amended rules are adopted in order to update the rules for changes made in the Texas Government Code ("Government Code") and the Texas Insurance Code ("Insurance Code") regarding administrative appeals procedures with respect to programs administered by ERS and for other reasons provided herein. The anticipated benefit resulting from these adopted rules includes enhanced fairness, clarity, effectiveness and efficiency of the procedures governing ERS contested case proceedings while protecting private medical and health information from undue disclosure in accordance with applicable law. The following describes the adopted amendments and additions and the reasons for the changes.

1. General Revisions

The adoption of amendments to §§67.1, 67.3, 67.5, 67.7, 67.9, 67.11, 67.13, 67.15, 67.17, 67.19, 67.21, 67.23, 67.25, 67.27, 67.31, 67.33, 67.35, 67.37, 67.39, 67.41, 67.43, 67.45, 67.47, 67.49, 67.51, 67.53, 67.55, 67.57, 67.61, 67.63, 67.65, 67.69, 67.71, 67.73, 67.75, 67.77, 67.79, 67.81, 67.83, 67.85, 67.87, 67.89, 67.91, 67.93, 67.95, 67.97, 67.99, 67.101, 67.103, 67.105, 67.107, and 67.109 include nonsubstantive revisions to capitalize terms defined by §§67.3 and 67.23 and/or to reorganize and clarify the meaning of certain terms and phrases. These adopted amendments and new rules also address confidentiality issues arising under the Federal Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104 - 191) ("HIPAA") and rules promulgated pursuant to HIPAA and other laws pertaining to the privacy and confidentiality of medical, psychiatric and health information. Further, the amendments and additions to chapter 67 clarify the applicable procedures and rules governing contested case proceedings before the ERS Board of Trustees ("Board") and the delegation of the Board's authority to decide appeals from ERS determinations in accordance with applicable law. The Board's authority to delegate its authority to decide contested case matters is provided by Government Code §815.511(d) and Insurance Code §1551.360.

2. §67.1. Purpose and Scope

Section 67.1 is adopted to clarify that chapter 67 provides the exclusive procedural rules in ERS proceedings as provided by Government Code §815.102(b), and that the rules do not change the powers of the Board or parties to ERS proceedings. Also, the rules do not waive any immunities available to ERS, its trustees, officers, employees, agents, administering firms and insurers. The adopted rules are consistent with the premise that rules of procedure are not intended to modify the substantive rights of affected parties. The amendments also clarify that, as adopted by §67.1(c), the Texas Rules of Civil Procedure ("Tex. R. Civ. P.") apply to ERS proceedings to the extent consistent with the provisions of chapter 67 or the Texas Administrative Procedure

Act (Government Code §§2001.001 et seq.) ("APA"). The Tex. R. Civ. P. provide various "gap filling" procedural rules to govern procedural matters not specifically addressed in chapter 67. However, where the provisions of the APA conflict with the Tex. R. Civ. P. or chapter 67, the requirements of the APA and chapter 67 control respectively in ERS proceedings.

3. §67.3. Definitions

Section 67.3 is adopted to clarify the definition of "Agency" because specific reference excluding the Texas Workers' Compensation Commission from the definition is no longer necessary due to recent changes in law.

A new definition for "Authorized Representative" is adopted to clarify that attorneys and non-lawyers may represent parties in ERS proceedings.

The definition of "Contested Case" is deleted because the term is subsumed in the amended definition of "Proceeding."

The definition of "Executive Director" is adopted to include her designee within the scope of the defined term. Pursuant to Government Code §815.511(d) and Insurance Code §1551.360(b), the Executive Director may delegate her duties to her designee. The definition is adopted to encompass the actions of the Executive Director's designee as authorized by the above statutes.

The definition of "Order" is clarified to include orders by the Executive Director or her designee as well as the Board or its designee.

The definition of "Pleading" is adopted to clarify the scope and types of legal documents that fall within the ambit of the definition and thereby provide additional guidance to Parties in ERS proceedings as to when the procedural requirements pertaining to Pleadings apply.

The definition of "Proceeding" is adopted to clarify the scope of the definition. Proceedings include, but are not limited to contested case matters. The term includes other matters as stated in the definition. The adopted amendment provides additional guidance to parties regarding the application of chapter 67 rules to all matters within the scope of the defined term.

4. §67.5. Appeal of Denied Claims

Section 67.5 is adopted to change the title of the section to "Appeals" because appeals may include ERS matters other than the denial of claims. The section is further amended to clarify that appeals relating to ERS actions apply to not only the denial of benefit claims by ERS, but other matters for which appeal rights are conferred by statute. Such rights include, but are not limited to the assessment of sanctions and overpayment obligations as authorized by Government Code §815.109 and Insurance Code §1551.351. The adopted rule also establishes mandatory venue in Austin, Texas for ERS administrative hearings consistent with Government Code §815.511(f) and Insurance Code §1551.359. Further, new §67.74 provides telephonic hearing procedures to accommodate out-of-town parties and witnesses in many circumstances. The new rule codifies ERS' long time practice regarding allowing telephone participation by parties and witnesses where appropriate.

Subsection 67.5(c) incorporates statutory limitations on standing to bring appeals as provided by Government Code §815.511(a) and Insurance Code §1551.356. The statutes do not confer standing on any person other than a "person aggrieved" as stated in §815.511(a) or an "employee, participant, annuitant, or covered dependent" participating in the Texas Employees Group Benefits Program established by chapter 1551 of the Insurance Code. Because there is no statutory standing conferred on the entities expressly excluded from standing under the adopted rule amendment, §67.5(c) clarifies that entities including healthcare providers and most types of ERS vendors do not have standing to bring administrative appeals relating to ERS matters.

A new §67.5(d) is adopted to exercise the Board's statutory authority to delegate to the Executive Director its authority to decide appeals in ERS proceedings. The delegation of the Board's authority will promote timely, efficient and fair administrative decisions because the Executive Director will be able to decide such cases more frequently than the Board, and the Executive Director will have the benefit of the same record that is available to the Board at the time the final administrative decision is being made. Consequently, ERS Appellants will be able to obtain final agency decisions more quickly than under past practice in which such decisions were made during regularly scheduled Board meetings. In addition, the Executive Director will have discretion to refer particular cases to the Board for final determination when appropriate. Such referrals may be warranted when an appeal presents a previously unaddressed policy issue or other unusual circumstance justifying the Board's consideration.

Subsection 67.5(d) amendments clarify that the Executive Director may delegate her duties in either a particular matter or more generally. Government Code §815.202(f) grants the authority for the Executive Director to delegate her duties to other ERS employees.

5. §67.7. Filing and Service of Documents and Pleadings

Adopted amendments to §67.7(a) clarify that other rules in chapter 67 may require documents to be filed with someone other than the Executive Director. During the period in which a hearing examiner ("Examiner") has jurisdiction over a proceeding, pleadings and other documents are to be served on the Examiner rather than the Executive Director. The amendments to §67.7(b) clarifies existing practice and procedure that an Examiner loses jurisdiction after she issues a final proposal for decision. At that point, jurisdiction to make the final administrative decision in the appeal is conferred on the Board or its designee. Because of the transfer of jurisdiction, it is appropriate that all pleadings and documents be filed with the Executive Director because the Examiner no longer has any authority to take action in response to such filings.

The adopted amendments to §67.7(d) clarify that service of documents and pleadings may be made to a party or to the party's authorized representative if one has been retained. This clarification is consistent with customary practice and procedure in litigation where service is to be made on a party's attorney if the party is represented.

Subsection 67.7(f) is adopted to cross-reference new §67.108 which provides procedures for sanctions. Failure to serve opposing parties may warrant the imposition of sanctions, especially if the failure is intentional. Proper service is fundamental to providing fair and reasonable notice in contested case proceedings and the requirement should be properly enforced, if necessary, through appropriate sanctions.

6. §67.9. Computation of Time

Subsection 67.9(b) is adopted to reflect that extensions of time may be granted by an agreement of the parties as well as by a motion showing good cause. If the parties agree to an extension,

no harm will likely result from an order granting such a request. The adopted change recognizes and codifies the common practice of granting an agreed request for an extension of time in a contested case.

7. §67.13. Conduct and Decorum

Adopted amendments to §67.13 identify the applicable ethics standards that are observed in litigation and administrative proceedings generally, as well as in ERS proceedings, and they also clarify to whom the standards of conduct apply. The Texas Lawyers Creed and the Texas Disciplinary Rules of Professional Conduct are referenced with respect to the current ethical standards applicable to authorized representatives. They are appropriate standards because they provide the core basis for governing the conduct of lawyers in Texas. Reference to the "Code of Professional Responsibility" is deleted because it has been replaced by the "Texas Disciplinary Rules of Professional Conduct." Reference to the "Canons of Judicial Ethics" is deleted because the canons provide ethical standards for judges rather than lawyers. Because not all authorized representatives are lawyers, the rule is further clarified to reflect that it does not permit the unauthorized practice of law.

Subsection 67.13(b) is adopted to reflect that an Examiner may not assess monetary payments for violations of the rule. The adopted change reflects that no statute authorizes the payment of trust funds for such purposes. As a matter of fairness, the change would apply equally to both ERS and other parties. Since state law does not authorize ERS to pay sanctions (payment of which could adversely impact the trust funds for which ERS is responsible) other parties should also not be subject to such penalties.

8. §67.21. Intervention

Adopted amendments to §67.21 change the deadline for filing a motion to intervene from fifteen to thirty days prior to the hearing on the merits or the Board's or its designee's consideration of an appeal. The change gives parties, the Examiner, and the final agency decision maker, additional time to respond to a motion to intervene and thereby avoid disruption of the proceedings that might result from a last minute attempt to intervene. The adopted change also clarifies that the time requirement applies to an attempt to intervene after the hearing on the merits but before the matter is submitted pursuant to §67.87 (relating to submission of appeals for a final administrative decision).

9. §67.27. Form and Content of Pleadings

The adopted amendments to §67.27(d) clarify that at various points in an ERS proceeding, the Examiner, Executive Director, the Board or its designee have authority to issue orders, and each pleading should be addressed to the person or entity with jurisdiction to act on the request. For example, under §67.43(d), the Executive Director has sole authority to decide a motion to reinstate an appeal that has been dismissed for a violation of the rule. Similarly, the Board's designee has the discretion to determine whether to grant a request for oral argument under §67.87. To avoid confusion, pleadings should be addressed to the person or entity with jurisdiction to rule on the party's request.

The adopted amendments to §67.27(d) also clarify that pleadings should include references to supporting authorities. Citation of authorities provides guidance to the parties and the decision maker regarding the legal basis for the relief requested.

10. §67.31. Written Motions

The adopted amendments to §67.31 provide additional guidance as to whom motions should be addressed. By directing parties to file motions with the person or agency authorized to rule on the motion, the amended rule helps ensure that requests for relief are received by the appropriate official or entity in a timely manner. The changes also clarify the general rule that a movant must give prior notice of at least three business days before a motion may be granted. The adopted change (as well as similar changes found elsewhere in the chapter) makes clear to parties that they may not minimize the amount of effective notice by filing a motion on a Friday with the expectation that Saturday and Sunday (and possibly a legal holiday) may count toward the prior notice requirement.

The adopted amendments also expressly state that the notice requirements of the rule may be excused on a showing of good cause. The exception recognizes that from time to time, unexpected events or emergencies may make problematic the giving of three business days prior notice before a motion is ruled upon.

11. §67.33. Amended Pleadings

Adopted amendments to §67.33 will establish a thirty day deadline for filing an amended pleading without leave to amend. The adopted revisions also provide that a motion for leave to amend pleadings must be filed no later than three business days prior to hearing. The changes are designed to assure that parties receive reasonable notice of amended pleadings so that they have a meaningful opportunity to respond.

12. §67.35. Incorporation of Board Records by Reference

Section 67.35 is adopted to change the title of the section to "Incorporation of Board or ERS Records by Reference." The section also clarifies that an adoption of a document by reference in a pleading does not relieve parties of their burden of proof to produce admissible evidence to support their claims.

13. §67.39. Notice and Service

Adopted amendments to §67.39 clarify the procedures in an appeal for requesting additional issues that were not included in the initial notice of hearing issued by ERS and served on the parties. The adopted rule requires that such a request be served not less than thirty days prior to hearing as compared to ten days under the current rule. Also, the adopted rule specifies that a response to a motion for additional issues must be filed and served within fourteen days from the date the motion is served.

The adopted amendments provide an orderly procedure that avoids undue surprise resulting from an attempt to interject new issues on appeal at the eve of trial. Occasionally in ERS proceedings, a party may seek to interject issues that may be irrelevant, prejudicial or simply not within ERS' or the Examiner's jurisdiction to consider. Therefore, the procedure also helps ensure that adequate time is allowed to analyze a request for additional issues and to accept only those matters that are within ERS' or the Examiner's jurisdiction and that are material and relevant. The adopted amendments also provide seven as opposed to five days notice to the parties of the additional issues to be decided. The additional two days gives the parties extra time to respond to the inclusion of new issues. For example, an opposing party may request a continuance where the inclusion of new issues provides good cause for additional discovery or other actions related to the new matters.

14. §67.41. Contents of Notice

Section 67.41 is adopted to change the title of the section to "Contents of Initial Notice and Amendments." The section is also amended to revise the procedure for amending the initial notice of hearing in an ERS proceeding. At times, the information available to ERS is not sufficient to state all appeal issues in detail at the outset of a contested case. For example, in an overpayment situation ERS may not have complete information regarding the amounts owed by an appellant, although a determination may have been made that the appellant received some amount of overpayments. The revised procedure permits the Executive Director to file an amended or supplemental notice of the issues to provide a more detailed statement once additional information is received.

The adopted amendments also clarify that parties may request another party to file a more definite statement of the issues when appropriate. The deadlines for making and responding to such a request are unchanged.

15. §67.43. Dismissal without Hearing

Adopted amendments to §67.43(b)(3) clarify that an appeal may be dismissed for failure to comply with an order from the Executive Director as well as from an Examiner. This change reflects the Executive Director's authority to issue certain orders both before and after the Examiner has jurisdiction over an ERS proceeding.

Adopted amendments to §67.43(d) reflect the current rule that all dismissals under the rule are mandatory rather than conditional. The adopted rule also provides a thirty day deadline for filing a motion to reinstate with the Executive Director after a dismissal. The thirty days begins from the date an order of dismissal is served. The adopted amendments also clarify the existing practice and procedure that the Executive Director has sole discretion to permit a reinstatement based on a showing of good cause, and that her decision constitutes final agency action.

The adopted amendments promote an orderly process for dealing with failures to prosecute appeals and encourage diligence by the parties in seeking administrative remedies which is consistent with the Tex. R. Civ. P. 165a. Also, requiring mandatory dismissal subject to reinstatement for good cause helps avoid delays to appellants that otherwise may result from the dilatory practices of other parties. For example, when an appellant fails to appear for hearing without good cause and afterward requests another hearing, his request is contrary to the interests of other parties in other appeals to have their day in court. In order to avoid this inequitable result and to conserve ERS' trust fund resources, the rule requires a mandatory dismissal subject to reinstatement for good cause. This approach parallels common procedural practice in state courts.

16. §67.45. Prehearing Conference

Subsection 67.45(b) is adopted to specify that a motion or notice relating to a prehearing conference shall describe the subject matter of the conference with reasonable specificity. The rule is adopted so that parties are assured reasonable notice of the subject(s) to be addressed at a prehearing conference. Parties will be better prepared to address issues raised in a prehearing conference if they have prior notice of the subject matter.

17. §67.47. Postponements or Continuances

Adopted amendments to §67.47 clarify that opposed motions for continuance must be supported by competent pleading and evidence showing good cause for the request. Tex. R. Civ. P. 251 - 253 (relating to motions for continuance) are expressly incorporated into the rule to make clear that the procedural requirements of those rules apply to opposed motions for continuance filed in ERS proceedings. The adopted amendments also clarify the requirements for showing good cause for a late filed motion for continuance.

The adopted amendments to the rule emphasize the need to show good cause for an opposed continuance request in order to deter parties from requesting multiple continuances without showing substantial need or justification for the postponements. Multiple unreasonable continuances delay ERS proceedings and cause parties to incur additional unnecessary expenditure of time and resources in preparing and re-preparing for a hearing that is repeatedly continued.

18. §67.53. Presiding Officer

Adopted amendments to §67.53 include a new subsection (b) which identifies the Texas Code of Judicial Conduct as the source of ethical standards governing the conduct of Examiners in ERS proceedings. The adopted amendments also specify that Examiners shall conduct ERS proceedings in a fair and impartial manner, and they shall refrain from providing legal advice or guidance to any of the parties, other than with respect to minor procedural matters. Such actions are not consistent with the Examiner's proper function of being an impartial presiding officer, and they are not appropriate in ERS proceedings and are inconsistent with the statutory requirements with which Examiners are obligated to comply when conducting such proceedings.

19. §67.55. Order of Procedure

Adopted amendments to §67.55 clarify the procedures at hearings in ERS proceedings. Subsection (b) is modified to conform ERS' rule concerning burden of proof with its statutes addressing the matter: Government Code §815.511(c) and Insurance Code §1551.351(d). Each of the statutes specifies that the appellant in an ERS proceeding has the burden of proof on all issues, including issues in the nature of an affirmative defense.

The adopted amendments to §67.55(c) clarify the limits on the nature and scope of questions an Examiner may ask a witness. The adopted rule discourages questions designed to assist parties in meeting their burden of proof or in rebutting evidence through cross-examination. Clarifying questions are appropriate as necessary to ensure that the record provides an accurate and complete account of the witnesses' testimony.

Adopted §67.55(d) expressly states the procedure for invoking "The Rule" as provided in Tex, R. Civ. P. 267(a). The purpose of The Rule is to ensure that a witness' testimony is not modified in response to the testimony of another witness. Accordingly, when The Rule is invoked, witnesses (other than the parties and their authorized representatives) are asked to wait outside the hearing room until they are called to testify. They are also instructed not to discuss their testimony with anyone prior to being called to the stand. This procedure helps ensure that testimony is truthful and not tainted by what a witness might otherwise hear from other witnesses. The adopted amendment makes clear that the procedure may be invoked in ERS proceedings as provided by Tex. R. Civ. P. 267(a). The adopted amendments also provide for sanctions for a violation of The Rule. The sanctions provision provides a deterrent for witnesses and others who might be inclined to violate The Rule. Sanctions also provide a reasonable remedy when a party is prejudiced by a violation. The sanctions allowed are those described in §67.13, and do not include any

monetary penalties. See the discussion regarding the adopted amendments to §67.13.

The adopted amendment to §67.55(g) revises ERS' rule regarding submission of additional evidence after a hearing on the merits of an appeal. The adopted rule requires a party to move for the inclusion of additional evidence upon a showing of good cause. The movant would have to show that the new evidence was not reasonably known or knowable to him at the time of the hearing, or that another party had failed to provide discovery that would have disclosed the evidence.

The adopted amendments will help ensure that each party acts diligently and is prepared to make his case at the hearing on the merits. Conversely, the rule discourages a somewhat common practice in ERS proceedings in which a party uses the hearing to find out what he needs to prove and then asks that the hearing be continued while he seeks additional evidence to fill in any "gaps" in his proof. Through this tactic, a party may receive multiple opportunities to obtain and tailor his evidence in response to the other side's case. This practice is inefficient and costly in resources, sometimes causing lengthy delays in ERS appeals. Also, it is contrary to the customary adversarial process whereby parties have one opportunity after discovery and investigation to present their evidence at a trial on the merits. On the other hand, the good cause exception allows a diligent party who learns of new evidence at or after a hearing to get the evidence into the record. Finally, limiting the ability to ask for additional evidence makes the amendment consistent with state court and proper administrative practice. See also the discussion concerning adopted amendments to §§67.53 and 67.55(c).

20. §67.61. Offer of Proof

The adopted amendments to §67.61 clarify the procedure for Examiners to ask clarifying questions in connection with an offer of proof. An offer of proof is a procedure to memorialize evidence that has been offered but not admitted into evidence. A party making an offer of proof shows what the evidence would have been if it had been admitted. The offer facilitates review of the Examiner's ruling denying admission of the evidence. Subsection 67.61(b) is clarified to ensure that clarifying questions concerning an offer of proof are confined to the limits described in the adopted amendments to §67.55(b). See the discussion of the adopted amendments to §67.55(b) regarding clarifying questions.

21. §67.65. The Record

The adopted amendments to §67.65(b) clarify the procedures used when evidence is offered after the record is closed. The record defines and limits the evidence that the Board or its designee may consider in deciding an ERS appeal. Under the current rule, new evidence may not be admitted absent a showing of good cause as to why the evidence could not reasonably have been presented at the hearing on the merits of the appeal. The adopted amendment emphasizes that newly offered evidence must also be relevant and material, and that the opposing party must have the opportunity to conduct cross-examination and offer rebuttal evidence in response to the new evidence.

The opportunity to challenge an opponent's evidence is a fundamental tenet of the adversarial process. Rebuttal evidence and cross-examination are core tools used in contested cases to test the truthfulness, reliability and accuracy of evidence. If newly discovered evidence is admitted into evidence after the record closes, opposing parties must be given the same opportunity to test the evidence as they would have if the evidence was admitted at a hearing on the merits.

The adopted amendments also clarify that the Executive Director may be requested to consider new evidence after the record closes and the Examiner no longer has jurisdiction over the appeal. If a party requests admission of newly discovered evidence after an Examiner issues a final proposal for decision, the Executive Director will be responsible for ruling on the request. In addition, when a party offers evidence in connection with a motion to reinstate following a dismissal under §67.43, the Executive Director must decide whether or not to admit the evidence offered.

22. §67.69. Rules of Evidence

The adoption of §67.69(b) conforms the rule to current statutory and Board policy. The adopted rule requires that opinion evidence of a medical condition or cause must be based on reasonable medical probability and be supported by objective medical evidence. The adopted amendment also clarifies that subjective complaints of illness that are not corroborated by objective medical evidence may not support a finding of fact relating to an allegation concerning medical issues.

The adopted rule incorporates the policy stated in Government Code §814.203 which mandates that the ERS Medical Board's medical evaluation of ERS disability retirement claims be supported by "substantial, objective, medical evidence." Also, the adopted amendment reflects long-standing Board policy that findings of fact relating to medical issues must be supported by objective medical evidence. See Appeal of Sharon House, SOAH Docket No. 327-03-3111 (February 2005). In discussing its decision in that appeal, the Board noted that it had long required that findings concerning medical condition or causation must be supported by objective medical evidence. See e.g. The Appeal of Gwendolyn Woodard, SOAH Docket No. 327-99-1695 (April, 2000) (ERS Board Decision denying an appeal for benefits where there were no objective clinical findings that the appellant was unable to engage in any sedentary occupation). The Board stated that an award of disability retirement benefits that is not based on objective medical evidence does not provide reasonable assurance that a person claiming such benefits is truly disabled. If only subjective complaints of pain were sufficient to support such a claim, the trust fund would be subject to unwarranted liabilities by those members willing to overstate or falsely represent that they are suffering from disabling pain. In addition, some treating physicians could be tempted to assist patients who might make such improper claims because the award of disability benefits includes insurance to cover the doctor's further treatment of the patient. Also, requiring that findings on medical issues be supported by objective medical evidence is essential to protect the ERS trust fund and the participants in the trust fund from unmerited claims based on sincere, but speculative opinions by physicians and claimants. Accordingly, to ensure that disability retirement claims are awarded properly, the medical aspects of the claim must be supported by objective medical evidence. The Board concluded that because certain prior adopted findings of fact in House were not supported by objective medical evidence, and were in fact controverted by the objective medical evidence, they were violative of the Board's policy.

The adopted rule is also consistent with current Texas case law requiring that expert opinions have a reliable scientific basis. See e.g. Merrell Dow Pharmaceuticals v. Havner, 953 S.W.2d 706, 714 (Tex. 1997) (stating that if the foundational data underlying opinion testimony are unreliable, an expert will not be

permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable; and that if an expert's scientific testimony is unreliable, it is not evidence).

23. §67.73. Documentary Evidence

The adoption of §67.73(c) clarifies the procedures for protecting confidential medical, psychiatric and health information from public disclosure through the contested case process. Many ERS proceedings involve medical information that is protected from disclosure by law. See e.g. HIPAA and other laws pertaining to the privacy and confidentiality of medical and health information. Examples of such sensitive information could include evidence of adolescent drug abuse or eating disorders, sexually transmitted diseases and psychiatric disorders. In order to protect the privacy of appellants from the disclosure of such confidential and legally protected information, §67.73(c) provides a "sealing" procedure to protect against the disclosure of the information to persons other than the parties (including their authorized representatives and staff), the Examiner, the ERS Executive Director, the Board and its designee. In ERS proceedings, evidence that is not sealed is generally considered open for public inspection.

The adopted amendment provides exceptions to sealing for evidence showing fraud, other ERS policy violations warranting disciplinary action under ERS' jurisdiction, and a law enforcement exclusion. The application of Tex. R. Civ. P. 76a (relating to procedures for sealing "court documents") is expressly excluded. The requirements of Rule 76a predate HIPAA and appear inconsistent with the regulatory mandates and policy reflected therein. Further, the requirements of public notice, participation and hearing are not consistent with ERS rules and statutes limiting standing and making ERS member and participant information confidential and not subject to disclosure except in certain specifically enumerated circumstances. See e. g. Insurance Code §1551.356 (concerning standing to appeal in ERS proceedings); and Government Code §815.503 and Insurance Code §1551.063 (relating to the confidentiality of records). Also, the jurisdiction and remedial provisions of Rule 76a are not incorporated or referenced into the exclusive jurisdiction and remedies applicable to ERS proceedings. See Government Code §815.511(a) and (d) and Insurance Code §1551.351(d) (relating to exclusive jurisdiction in ERS proceedings) and Government Code §815.513 and Insurance Code §1551.014 (pertaining to exclusive remedies). Also, the procedures described in Rule 76a are inconsistent with the doctrine of exhaustion of administrative remedies. In addition, Rule 76a may only apply to ERS proceedings if it is expressly adopted by the Board pursuant to its rulemaking authority. Because the rule imposes excessive procedural burdens on the parties to ERS proceedings that are not consistent with the policies, plans, intent and purposes described above as well as other statutes governing ERS proceedings, the provisions of Rule 76a should not be adopted.

24. New §67.74. Telephonic Proceedings

Adopted new §67.74 is added to formalize ERS procedure regarding participation by telephone of appellants and witnesses. The new rule adopts substantially, the State Office of Administrative Hearings' rule concerning the same subject, 1 Texas Administrative Code §155.45. The adopted provision describes how a party may request a telephonic hearing and the exceptions and limitations applicable to such requests.

The option to participate by telephone in ERS proceedings may substantially relieve the burden on out-of-town appellants and witnesses who may be inconvenienced if required to travel to Austin for a hearing. However, the adopted rule also recognizes that participation by telephone may not be appropriate when it is important for the Examiner and the parties to observe a witness' demeanor while testifying. The adopted rule also addresses the importance of properly identifying witnesses who testify by telephone, protecting the record against coached testimony, and keeping witnesses separated. See the discussion regarding adopted amendments to §67.55.

25. §67.77. Introduction of Exhibits

Adopted amendments to §67.77(d) clarify ERS' procedures for filing and admission of late exhibits. Acceptance and admission of such exhibits would only be permitted upon a showing of good cause for the failure to offer the exhibit at the hearing. The reasons for this adopted amendment are as stated in the analysis regarding the adopted amendments to §67.55(g).

26. §67.81. Examiner's Report and Proposal for Decision

Section 67.81 is adopted to change the title of the section to "Examiner's Proposal for Decision." The section is further amended primarily for purposes of reorganization. In addition, references in the section to the Examiner's "report," as well as similar changes adopted in other parts of chapter 67, clarify the scope and nature of what the Examiner shall prepare for consideration by the Board and its designee. Preparation of a "report" that is separate and distinct from the proposal for decision is not consistent with the requirements of §2001.062(d) of the APA nor with Examiners' practice in ERS proceedings. Also, the substance of a "report" is included in the analysis section of a proposal for decision which summarizes the issues, positions of the party, the evidence and the applicable law concerning the appeal.

Adopted changes to §67.81(b) clarify the point at which jurisdiction over an appeal transfers from the Examiner to the Executive Director, Board and its Designee. The clarification conforms the rule to existing law and practice recognizing that the Examiner's jurisdiction ends with the service of his final proposal for decision after considering exceptions and replies to exceptions filed, if any. Also, the clarification will help avoid confusion by parties in ERS proceedings regarding the point at which jurisdiction is transferred from the Examiner back to ERS.

27. §67.83. Filing of Exceptions and Replies

Adopted amendments to §67.83(a) specify that an Examiner should file a response to exceptions to a proposal for decision and replies to exceptions, if any, within thirty days from the last timely filing of such pleadings.

The adopted change provides additional guidance to Examiners as to when their final proposal for decision should be filed with ERS. Also, the change helps insure that the Examiner's response will be filed in a timely manner consistent with the Examiner's need to consider carefully any exceptions and replies filed in connection with a proposal for decision.

28. §67.87. Oral Argument before the Board

Section 67.87 is adopted to change the title of the section to "Submission of Appeals to the Board's Designee." The section is further amended to provide the procedures for the Board designee's review and final decision of ERS contested cases and other proceedings pursuant to the Board's authority to delegate that power as authorized by Government Code §815.511(d) and Insurance Code §1551.360 and as provided in

the adopted amendment to §67.5(d). The amendments provide that the Board's designee will decide contested cases and other proceedings by submission of the record unless good cause is shown for oral argument.

As previously discussed in the analysis regarding the adopted amendments to §67.5(d), delegation of the Board's authority to decide contested cases and other proceedings provides the means to decide cases expeditiously and efficiently. The Board's designee will be available to consider contested cases on a more frequent basis than with respect to the current practice of deciding cases at certain regularly scheduled Board meetings. Under the adopted delegation procedure, the time for deciding cases may be shortened by an average of three to four months. Because ERS appellants often are in immediate desire of the contested benefits, shortening the time for making final decisions on appeals will directly serve their interests. The adopted amendments also provide the parties with the option to submit written arguments to the designee. This procedure is designed to provide the parties an opportunity to address any final arguments and comments to the final agency decision maker before the decision is made. Under current practice, parties are afforded an opportunity to address the Board before it makes its final decision on an appeal. The written argument procedure provides a corollary process with respect to cases decided by submission to the Board's designee. All written arguments must be limited to matters that are within the record.

The adopted amendments favor the submission process over oral presentations because the former procedure fosters a more timely and efficient disposition of appeals. However, where a contested case presents novel or complicated issues warranting oral arguments, questions and discussion between the Board's designee and the parties, the adopted rule changes permit the option of allowing oral argument on a showing of good cause.

29. §67.89. Presentation of Contested Cases to the Board

Section 67.89 is adopted to change the title of the section to "Presentation of Contested Cases to the Board or its Designee." The section further clarifies that the procedures for oral argument to the Board shall also apply to oral arguments to the Board's designee when such proceedings are permitted.

30. §67.91. Form, Content and Service of Orders

The adopted amendments to §67.91(b) add additional criteria for modifying or deleting adopted findings of fact and conclusions of law. Government Code §815.511(d) and Insurance Code §1551.357 authorize the Board to modify, refuse to accept, or delete any adopted finding of fact or conclusion of law contained in a proposal for decision, or make alternative findings of fact or conclusions of law. These statutes also specifically authorize the Board to delegate its authority to make such changes to its designee. The Board or its designee must state the reasons for such changes and may adopt rules relating to this procedure.

The additional criteria for adding, modifying or deleting proposed findings of fact and conclusions of law would apply when a proposed finding or conclusion is:

* Based on a medical opinion that is not supported by objective medical evidence, or is not based on reasonable medical probability;

* Confusing, incomplete or misleading; or

* Immaterial or irrelevant to the issues.

The first criteria is added to conform to the Board's policy and applicable law that findings of fact and conclusions of law relating to medical issues must be based on objective medical evidence and otherwise reliable. See the discussion concerning adopted amendments to §67.69. The remaining additional criteria are appropriate to correct proposed findings of fact that are unclear, internally inconsistent, not fully articulated, may result in a misunderstanding of the facts and issues or interject matters that are extraneous to the issues on appeal. Correction of such errors helps assure that ERS appeals are decided correctly based on the facts and law, and that the reasons for the decision are articulated in a concise, accurate and understandable manner.

The adopted amendments also clarify that the procedures stated in the rule apply to the Board's designee as well as the Board. In addition, the changes state that correction of nonsubstantive typographical errors do not need to be explained because the need is evident on the face of the document and does not affect the legal consequences of the adopted finding of fact or conclusion of law.

31. §67.93. Administrative Finality

The adopted amendments to §67.93 clarify when an administrative decision in a contested case becomes final. In addition to the criteria included in the current rule, the amendment references the adoption by the Board, or its designee, of a final order and the failure to file a motion for rehearing within the time prescribed by §67.97. This addition clarifies that an order will become final when no motion for rehearing is timely filed.

Adoption of §67.93(b) clarifies that the requirement for filing a motion for rehearing applies to any decision in ERS proceedings that constitutes final agency action. For example, the denial of a motion to reinstate under §67.43(d) constitutes final agency action subject to a motion for rehearing. The failure to file a motion for rehearing may constitute a failure to exhaust administrative remedies.

The adopted rule conforms to existing law requiring the filing of a motion for rehearing as a prerequisite for judicial review. APA §2001.145(a). The purpose of a motion for rehearing is to apprise the agency of the error claimed and allow the agency an opportunity to correct the error. Suburban Util. Corp. v. Public Util. Comm'n, 652 S.W.2d 358, 364 - 365 (Tex. 1983); BFI Waste Sys. v. Martinez Environmental Group., 93 S.W.3d 570, 578 (Tex. App. - Austin 2002, pet. denied). "The timely filing of a motion for rehearing is jurisdictional." BFI Waste Sys., 93 S.W.3d at 578.

32. §67.101. Ex Parte Communications

The adopted amendments to §67.101 include the addition of subsection (c) to clarify that the prohibition against ex parte communications does not include communications between the Executive Director, the Board or its designee and their staff, including, but not limited to the ERS general counsel and staff experts. Such communications are permitted by APA §2001.061(c).

33. §67.107. Discovery Generally

The adopted amendments to §67.107 include a reference to Tex. R. Civ. P. 190.2 as the basis for defining certain time lines and limitations concerning discovery. Those limitations include a discovery completion deadline of thirty days before trial, a six hour limit per side on deposition questioning and a limit of 25 interrogatories per responding party (except for interrogatories made for the purpose of authenticating documents).

The discovery deadlines and limitations are generally appropriate for ERS proceedings because they provide a reasonable amount of discovery for each party, and the limits and deadlines may be modified by agreement as provided by rule 190.2.

34. New §67.108. Discovery Sanctions

A new adopted §67.108 is added to specify that the provisions of Tex. R. Civ. P. 215 (concerning sanctions) apply to the extent that they are consistent with the APA and do not involve monetary penalties. See the discussion of the adopted amendments to §67.13 for the reasons against allowing monetary sanctions in ERS proceedings. The adopted amendments also specify that an award of sanctions is subject to review by the Board or its designee, except as otherwise provided by APA §§2001.201 and 2001.202 (concerning judicial enforcement of subpoenas, final orders, decisions and rules). Reservation to the Board and its designee of the authority to review sanctions orders is consistent with their statutory authority and jurisdiction over ERS contested case matters as discussed above.

35. §67.109. Witness Fees

The adopted amendments to §67.109 include the express addition of the requirement that the witness fee for a retained expert shall be paid by the party who retained the witness. The adopted amendment comports with the requirement of Tex. R. Civ. P. 195.7 which imposes the costs associated with deposing a retained expert on the party who retained him.

Comments

No comments were received on the proposed new rules and amendments.

Statutory Authority

The new and amended rules are adopted under Government Code, §815.102, which provides authorization for the ERS Board of Trustees to adopt rules for hearings on contested cases or disputed claims. In addition, Insurance Code, §1551.052 authorizes the Board of Trustees to adopt rules consistent with the chapter as it considers necessary to implement the chapter and its purposes. The adopted new and amended rules apply to all proceedings involving programs administered by ERS, including Government Code Title 8, Insurance Code Chapters 1551 and 1552, Government Code Chapters 615 and 609 and do not affect any other statutes, articles, or codes.

§67.5. Appeals.

(a) When the Executive Director denies a claim, or takes other action for which an appeal is allowed by law, the Claimant has 30 days from the date the determination letter is served on the Claimant to file a written notice of appeal as specified in §67.7 of this chapter (relating to filing and service of documents and Pleadings). The determination letter will inform the Claimant of this right, as appropriate. Mandatory venue for an administrative hearing of the appeal will be in Austin, Texas.

(b) The Executive Director shall decide whether or not a notice of appeal is timely filed under this chapter. The Executive Director's decision constitutes final Agency action on the issue and no administrative appeal from the Executive Director's decision is available.

(c) Standing. Unless otherwise provided by law, standing to pursue an administrative appeal under this chapter is limited to Members, Insureds, Insurers, respondents, appellants, Claimants, Administering Firms, beneficiaries of a deceased Member or Insured, and Persons or Agencies permitted to intervene pursuant to §67.21 of this chapter (relating to intervention). Healthcare providers under the Texas Employees Group Benefits Act, ERS vendors (other than Insurers and Administering Firms) and other third parties not specifically designated herein as having standing do not have standing to appeal ERS decisions.

(d) In accordance with §815.511(d), Government Code and §1551.360, Insurance Code, the Board delegates its authority to determine all Proceedings within its jurisdiction to the Executive Director. In her discretion, the Executive Director may request the Board to decide a particular Proceeding when appropriate.

(e) The Executive Director may delegate, either generally, or in a particular Proceeding, the duties of the Executive Director under this chapter to another Person who is employed by ERS.

§67.89. Presentation of Contested Cases to the Board or its Designee.

(a) When a request for oral argument is granted pursuant to §67.87 of this chapter (relating to submission of appeals to the Board's designee), the Examiner who prepared the proposal for decision shall, if practicable, present the Proceeding to the Board or its designee during the Board meeting, or the designee's Proceeding, at which the case has been placed for final administrative decision. In presenting the case, the Examiner shall:

(1) concisely state the nature of the case;

(2) concisely state the positions of the Parties;

(3) concisely state his or her proposal for deciding the case and the basis for that proposal; and

(4) respond to questions concerning the hearing and the proposal directed to him from a Trustee or the Board's designee. The Examiner shall not present information that is not part of the record of the Proceeding.

(b) In a Proceeding that the Executive Director, in her sole discretion, determines should be set for consideration before the Board, a Party may present oral argument to the Board before the final determination of any Proceeding by filing with the Executive Director a written request to do so at least three (3) business days prior to the day on which the Board is to consider the Proceeding. If such a request is not timely filed, oral argument shall be allowed only at the discretion of the Board. In the event that oral argument is allowed and all Parties are present and prepared to present oral argument, the case will proceed. Otherwise, the Board may, in its sole discretion, hear the case in the absence of any Party, any Authorized Representative or the Examiner, or continue the case to a future meeting. In Proceedings affected by the Federal Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104 - 191) ("HIPAA") and rules promulgated pursuant to HIPAA, the Appellant must also file an authorization to allow disclosure of protected health information in any Proceeding before the Examiner, the Board or its designee.

(c) A Trustee or the Board's designee may question the Examiner concerning the hearing, the evidence, the proposal for decision or any other matter concerning the record of the Proceeding. In responding to a question, the Examiner must advise the chairman of the Board or the Board's designee if the Examiner believes the question involves a matter outside the record of the Proceeding or is otherwise improper. The chairman of the Board or the Board's designee may ask the general counsel for her opinion concerning the propriety of a particular question. The decision of the chairman of the Board or the Board's designee concerning the propriety of a question shall be final.

(d) A Trustee or the Board's designee may ask the general counsel for her opinion concerning the legality of a particular course of action or decision, the law or rules governing a particular aspect of matters within the jurisdiction of the Board or its designee, the evalu-

ation of the evidence, or any other legal matter. The general counsel shall advise the chairman of the Board or the Board's designee if the general counsel is of the opinion that responding to a particular question would be inappropriate. The decision of the chairman of the Board or the Board's designee concerning the propriety of a question shall be final.

(e) If oral argument is allowed, then each Party will be given time, not to exceed ten (10) minutes, unless additional time is allowed by the chairman of the Board or the Board's designee, to present oral argument to the Board or its designee. Questions by the Board or its designee and answers to such questions will not be considered as part of the time limitations described in this section. Oral argument concerning matters outside the record and proffered documents not presented during the evidentiary hearing before the Examiner will not be allowed.

(f) After the Examiner presents his proposal for decision, the Trustees or the Board's designee have been given an opportunity to ask questions, oral argument is presented, and the Trustees or the Board's designee have been given an opportunity to discuss and consider the case, the Board or its designee shall act on the case and render a decision.

§67.103. Subpoenas.

(a) The issuance of subpoenas in any Proceeding shall be governed by the subpoena provisions of the APA (Government Code §2001.089). Following written request by a Party or on its own motion, the Executive Director or her designee may issue subpoenas addressed to the sheriff or any constable to require the attendance of witnesses and the production of books, records, papers, or other objects as may be necessary and proper for the purposes of a Proceeding. The subpoena may be issued only by the Executive Director or her designee.

(b) Motions for subpoenas to compel the attendance or production of witnesses, the production of books, records, papers, or other objects shall be addressed to the Executive Director and shall be verified and supported by a showing of good cause, and shall specify with reasonable particularity the Persons, books, records, papers, or other objects desired and the material and relevant facts to be proven by them.

(c) Subpoenas shall be issued by the Executive Director only after:

(1) the movant has shown good cause that the subpoena should be issued or all of the Parties have agreed pursuant to §67.11 of this chapter (relating to agreements to be in writing) that a subpoena should be issued; and

(2) the movant has deposited sums sufficient to ensure payment of all expenses incident to the subpoenas. Service of subpoenas and payment of witness fees and expenses shall be made in the manner prescribed in the APA §2001.089, 2001.103 and §67.109 of this chapter (relating to witness fees).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604768
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: September 14, 2006
Proposal publication date: July 21, 2006
For further information, please call: (512) 867-7421

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34 TAC §67.111

The Employees Retirement System of Texas ("ERS") adopts the repeal of 34 Texas Administrative Code, §67.111, concerning Conflicting Claims to Benefits, as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5791). The repeal of §67.111 is adopted because this rule is superseded by Texas Government Code §815.512 and Texas Insurance Code §1551.354 regarding procedures for addressing multiple competing claims. Section 67.111 is repealed in order to avoid confusion regarding the proper procedures and remedies in addressing competing claims for ERS benefits.

No comments were received on the proposed repeal of this rule.

The repeal is adopted under the Texas Government Code, §815.102 which provides authorization for the ERS Board of Trustees to adopt rules for hearings on contested cases or disputed claims. In addition, Texas Insurance Code, §1551.052 authorizes the Board of Trustees to adopt rules consistent with the chapter as it considers necessary to implement the chapter and its purposes. The adopted repeal does not affect any other statutes, articles, or codes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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Proposal publication date: July 21, 2006
For further information, please call: (512) 867-7421

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CHAPTER 87. DEFERRED COMPENSATION

34 TAC §§87.5, 87.7, 87.11, 87.17, 87.19, 87.31, 87.33

The Employees Retirement System of Texas ("ERS") adopts amendments to 34 Texas Administrative Code §§87.5, 87.7, 87.11, 87.17, 87.19, 87.31, and 87.33, concerning the Deferred Compensation Plan, without changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5792).

These adopted amendments are needed in order to update the Plan rules, to clarify Plan requirements, and to comport with federal law and administrative requirements. The anticipated benefit of adopting these amended rules is added flexibility for and protection of State of Texas Deferred Compensation Plan participants.

Adopted amendments to §87.5(b), concerning Participation by Employees, change the name of the form from a participant agreement to an enrollment form.

Adopted amendments to §87.7(b) and (k), concerning Prior Plan Vendor Participation, add certain definitions regarding capitalization changes in federal regulations and comport with the Federal Deposit Insurance Corporation Improvement Act of 1991 and the Deficit Reduction Act of 2005. Section 87.7(k) is also adopted

to reflect changes on the limits on federally insured account balances in credit unions, savings and loan institutions, and banks.

Adopted amendments to §87.11(b), concerning Advertising Material and Solicitation, make references to the prior plan consistent with the remainder of the Chapter.

Adopted amendments to §87.17(a) and (j), concerning Distributions, and §87.33(h), concerning the Economic Growth and Tax Relief and Reconciliation Act, require that the unforeseeable emergency distributions be certified in a form prescribed by the plan administrator or TPA and include representations of financial need by the participant. Section § 87.17(s) is also adopted to change the loan amortization period from quarterly to monthly and to clarify the language related to loans.

Adopted amendments to §87.19(d), concerning Reporting and Recordkeeping by Prior Plan Vendors, exclude annuitized accounts in the quarterly reports and require that the fiscal year end report must include transactions for July and August.

Adopted amendments to §87.31(b), concerning Revised Plan, clarify the manner of distribution.

No comments were received on the proposed amendments.

These amended rules are adopted under Government Code, Section 609.508, which provides authorization for the ERS Board of Trustees to adopt rules necessary to administer the deferred compensation plan. No other statutes are affected by these adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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For further information, please call: (512) 867-7421

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§97.243, 97.295, and 97.602, new §97.244 and §97.259, and the repeal of §97.244 in Chapter 97, governing Licensing Standards for Home and Community Support Services Agencies. The amendments to §97.295 and §97.602 are adopted with changes to the proposed text published in the June 16, 2006, issue of the *Texas Register* (31 TexReg 4848). The amendment to §97.243, new §97.244 and §97.259, and repeal of §97.244 are adopted without changes to the proposed text.

The amendments, new sections, and repeal are adopted to update provisions for home and community support services agencies (HCSSAs) regarding administrative and supervisory responsibilities, administrator and supervising nurse qualifications, training in the administration of an agency, and notifications for a client transfer or discharge. The amendments are adopted to update rule cross-references and correct the administrative penalty charts with the updated rule references. The amendments and new sections are adopted to add educational training requirements and continuing education requirements for an agency administrator.

DADS received written comments from AARP Texas in support of the proposed rules. DADS also received written comments from Advocacy, Incorporated; Texas Association for Home Care; A Plus Home Health Services; Allegiance Home Health of Southeast Texas, L.L.C.; Allegiance Home Health Services, L.L.C.; Alpha Home Nurses; At Home Healthcare; Auxi Healthcare Services, Brenham; Auxi Healthcare Services, Waco; Calvert Home Health Care, LTD; Christian Care Home Health; Christus Visiting Nurse Association of Houston; Christus VNA of Houston Hospice and Palliative Care; CN Healthcare Services, Inc.; Colony Health Care; Community Action Home Health; Coryell Memorial Home Health; DHS Healthcare, Inc.; Dyna Care Home Health; Edgewater Home Health Services; Griswold Special Care; Hendrick Housecalls; Homecare Network East, Inc.; Homewatch Caregivers of North Dallas; Kids Developmental Therapy; Memorial Home Health; Nurses in Touch, Inc.; Nurses Unlimited, Inc.; Omni Home Health Care, L.L.C.; Prescribed Home Health, Inc.; Promed Home Care; Pros Home Healthcare, Inc.; Providence Home Care; Real Home Health Care, Inc.; SierCam Healthcare Services, L.L.C.; St. Joseph's Home Health, Inc.; Visiting Nurse Association of El Paso, Inc.; and two individuals. A summary of the comments and the responses follow.

Comment: Concerning §97.259, a commenter expressed that the initial first-year training requirements would be costly and excessive. The commenter believes the initial training requirements can be successfully completed in about six hours versus the 24-hour requirement proposed in the rules and that four hours of continuing education each year is sufficient. The commenter suggested training on abuse and reporting should be required before an individual may serve as an administrator or alternate administrator.

Response: The agency feels strongly that newly appointed administrators must have the 24 initial training hours and an additional six continuing education hours to successfully perform their job functions. The current requirement is for six hours of continuing education per year. The agency does not believe that the in-depth training intended in the rule can be provided in the time suggested by the commenter. The rule language was not changed in response to this comment.

Comment: Concerning §97.295(a), 36 commenters opposed the requirement that an HCSSA provide a written discharge notice to a client's physician or practitioner. The commenters believe this is an administrative burden for HCSSAs and unwanted documentation for the physician, noting that the physician for a Medicare client must receive the discharge summary in writing. Commenters suggested that the physician or practitioner could be notified of the availability of a discharge summary, thus satisfying the Medicare requirements.

Response: While the agency feels strongly that the client's physician or practitioner must have prior notice of the discharge or transfer to allow for coordination of care, the agency agrees to remove the written notice requirement and allow any form of the required notice to the physician or practitioner. The rule language was changed in response to this comment.

Comment: Concerning §97.295(a), 36 commenters noted that "Medicare clients who are the majority of clients transferred or discharged on a regular basis, could conceivably receive seven or more different written notifications within one certification period leading to unnecessary confusion for the client." Thirty-five commenters believed that the Centers for Medicare and Medicaid Services Expedited Review process of the Home Health Advanced Beneficiary Notices (HHABN) will alleviate the issue for Medicare clients and eliminate confusion for the client that may be created by the proposed requirement. HCSSAs will have the additional administrative burden of providing another written notification at a different time frame from that required by Medicare.

Response: The agency cannot agree or disagree with the comment that Medicare clients are the majority of clients transferred or discharged regularly, because DADS does not track this statistic. The notices and certification periods noted in the comment refer to Medicare-required notices that must be provided at the start of care, at any reduction of care, or when the HCSSA suspects the client's Medicare coverage will cease. DADS cannot reduce the required notifications discussed because they are federal requirements related to fee-for-service issues. The Centers for Medicare and Medicaid Services has determined that an HCSSA that chooses to participate in the Medicare program has the obligation to assist the client to understand the Medicare payment program. The rule language was not changed in response to this comment.

Comment: Concerning §97.295(a), a commenter noted that, with the changes in Medicare-related HHABN and the Expedited review process, the regulation is an increased burden clinically and financially to HCSSAs. The commenter requested synchronization between the state and federal regulations.

Response: HCSSAs that choose to participate in the Medicare certification program agree to meet the standards for Medicare participation. These Medicare standards are sometimes higher or different than state licensing standards; HCSSAs that choose to participate in the Medicare program must meet both sets of requirements. Some of the state licensing standards match the federal requirements to the extent that the agency believes it is appropriate. As of July 27, 2006, of the 3,893 HCSSAs, 2,483 were Medicare-certified and 1,410 were licensed-only HCSSAs. The state licensure standards are written to govern licensed agencies and must be sufficient to regulate licensed-only HCSSAs. The rule language was not changed in response to this comment.

Comment: Concerning §97.295(a), a commenter requested an addition to require that all written notifications to the client be provided in the language and format (such as Spanish or Braille) required by the client.

Response: The agency agrees to examine the feasibility of such a requirement throughout Chapter 97 in the future. At this time, this change would pose implications for other rule sections in the chapter. The rule language was not changed in response to this comment.

Comment: Concerning §97.295(a), a commenter noted an administrative burden to an HCSSA based on the English-to-Spanish translation needs of the Hispanic population in the Midland, Texas, area. The commenter felt that a five-day written notice would cause a hardship on the client who, lacking understanding of his rights, would be frustrated and intimidated and might reject care. The commenter requested a notice that is very reader-friendly and understandable to all educational backgrounds.

Response: The agency understands clients sometimes have difficulty understanding written documents especially when there are barriers to communication such as language barriers and illness. The agency believes the presence of these barriers reinforces the necessity for HCSSAs to provide timely notice to clients. This would allow the client more time to get a better understanding of the transfer/discharge notice and to seek assistance if necessary. The HCSSA has a responsibility to provide education and interpretation of the client's rights. The rule language is not prescriptive as to the exact content of the notice and HCSSAs should develop a notice tailored to meet the needs and challenges of the clients they serve. The rule language was not changed in response to this comment.

Comment: Concerning §97.295(b), 36 commenters oppose the requirement that an HCSSA ensure that the client receives the written notice within the time frames specified. Commenters requested that the requirement be that the notice "be delivered" no later than two days before the discharge or transfer. Commenters maintain that an HCSSA has no way to ensure that the client received the notice without incurring additional administrative costs.

Response: The agency agreed to add language requiring the HCSSA to use delivery by hand or mail when providing written notice to the client. The agency's intent is that the HCSSA be held accountable for reasonable attempts to ensure the client's knowledge that transfer or discharge will occur on the date specified. The HCSSA may provide the written notice during the last home visit without incurring an administrative cost for postage and delivery.

However, the agency feels strongly that the client must be given adequate time to coordinate alternate forms of care and services when an HCSSA is discharging or transferring the client. For this reason, the time frame was not reduced to two days as requested.

Comment: Concerning §97.295(b), 36 commenters requested that the notification time frame be reduced to two calendar days for HCSSAs licensed to provide licensed home health, licensed and certified home health, and personal assistance services and noted that the proposed language has a two-day time frame for HCSSAs licensed to provide hospice services. The commenters noted that the two-day time frame is equal to Medicare requirements for HHABN, thus allowing HCSSAs to use the HHABN to notify the client of discharge to meet the licensing requirement and reducing paper and administrative costs. One commenter provided comments in support of having different notification time frames.

Response: The agency disagrees with the reduction of the notification time frames for HCSSAs licensed to provide licensed home health, licensed and certified home health, and personal assistance services to equal that proposed for licensed hospices. However, while hospice clients may be discharged or transferred for different reasons than a client receiving home health or personal assistance services, the agency agrees the time frame should be consistent for all HCSSA providers. There

are exceptions in the existing and proposed rule language that account for differing circumstances of hospices, thus eliminating the need for differing time frames. Therefore, the agency removed the proposed language allowing a hospice to provide written notice two working days before the event.

In addition, changes were made to §97.602(e) in the administrative penalties table to correct cross-references to §97.246 and §97.282 that were rendered incorrect with the adoption effective on June 1, 2006, and cross-references to §97.295 as changed by this adoption.

SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 3. AGENCY ADMINISTRATION

40 TAC §§97.243, 97.244, 97.259

The amendment and new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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40 TAC §97.244

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §97.295

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

§97.295. Client Transfer or Discharge Notification Requirements.

(a) Except as provided in subsection (e) of this section, an agency intending to transfer or discharge a client must:

(1) provide written notification to the client or the client's parent, family, spouse, significant other, or legal representative; and

(2) notify the client's attending physician or practitioner if he is involved in the agency's care of the client.

(b) An agency must ensure delivery of the written notification no later than five days before the date on which the client will be transferred or discharged.

(c) The agency must deliver the required notice by hand or by mail.

(d) If the agency delivers the written notice by mail:

(1) the notice must be mailed at least eight working days before the date of discharge or transfer; and

(2) the agency must speak with the client by telephone or in person to ensure the client's knowledge of the transfer or discharge at least five days before the date of discharge or transfer.

(e) An agency may transfer or discharge a client without prior notice required by subsection (b) of this section:

(1) upon the client's request;

(2) if the client's medical needs require transfer, such as a medical emergency;

(3) in the event of a natural disaster when the client's health and safety is at risk in accordance with provisions of §97.256 of this chapter (relating to Natural Disaster Preparedness);

(4) for the protection of staff or a client after the agency has made a documented reasonable effort to notify the client, the client's family and physician, and appropriate state or local authorities of the agency's concerns for staff or client safety, and in accordance with agency policy;

(5) according to physician orders; or

(6) if the client fails to pay for services, except as prohibited by federal law.

(f) An agency must keep the following in the client's file:

(1) a copy of the written notification provided to the client or the client's parent, family, spouse, significant other, or legal representative;

(2) documentation of the personal contact with the client if the required notice was delivered by mail; and

(3) documentation that the client's attending physician or practitioner was notified of the date of discharge.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. ENFORCEMENT

40 TAC §97.602

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

§97.602. Administrative Penalties.

(a) Assessing penalties. DADS may assess an administrative penalty against a licensed agency if the agency:

(1) violates the statute, Chapter 102 of the Occupations Code, or a provision of this chapter for which a penalty may be assessed;

(2) violates Health and Safety Code, §166.004; or

(3) fails to correct a violation in accordance with an approved plan of correction.

(b) Criteria for assessing penalties. DADS uses a schedule of appropriate and graduated penalties established in this subchapter to determine which violations warrant an administrative penalty.

(1) The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation, and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected agency identified the violation as part of its internal quality assurance process and made a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

(2) The schedule of appropriate and graduated penalties established in this section includes Severity Level A violations and Severity Level B violations.

(A) A Severity Level A violation is a minor violation.

(B) A Severity Level B violation is a violation that:

(i) results in serious harm to or death of a client;

(ii) constitutes a serious threat to the health or safety of a client; or

(iii) substantially limits the agency's capacity to provide care.

(c) Penalty range. An administrative penalty may not be less than $100 or more than $1,000 for each violation.

(1) For a Severity Level A violation, the penalty range is $100-$250.

(2) For a Severity Level B violation that:

(A) results in serious harm to or death of a client, the penalty is $1,000;

(B) constitutes a serious threat to the health or safety of a client, the penalty range is $500- $1,000; or

(C) substantially limits the agency's capacity to provide care, the penalty range is $500-$750.

(d) Penalty calculation and assessment.

(1) Each day that a violation occurs before the date on which an agency receives written notice of the violation is considered one violation.

(2) Each day that a violation occurs after the date on which an agency receives written notice of the violation constitutes a separate violation.

(3) A violation may be one or more Severity Level A violations, one or more Severity Level B violations, or a combination of Severity Level A and B violations. If the same survey finding constitutes both a Level A violation and a Level B violation, DADS only assesses the administrative penalty for the Level B violation.

(4) DADS may assess the greater amount of an administrative penalty if an agency violates more than one rule with the same act or failure to act.

(5) DADS may assess an administrative penalty even if an agency corrects the violation within the required time frame if the agency failed to correct the violation from the prior survey, provided the prior survey occurred no more than three years before the subsequent survey.

(6) If an agency fails to correct a violation and the uncorrected violation was cited more than three years before the repeated citation of the same violation, DADS does not assess an administrative penalty.

(e) Schedule of appropriate and graduated penalties.

(1) Severity Level A violations. DADS may assess a separate Level A administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(1)

(2) Severity Level B violations. DADS may assess a separate Level B administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(2)

(f) Opportunity to correct. DADS gives an agency an opportunity to correct a violation in accordance with the time frames established in §97.527(g)(2) of this chapter (relating to Post- Survey Procedures).

(g) Proposal of administrative penalties.

(1) If DADS assesses an administrative penalty, DADS provides a written notice of violation letter to an agency. The notice includes:

(A) a brief summary of the violation;

(B) the amount of the proposed penalty; and

(C) a statement of the agency's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(2) An agency may accept DADS' determination not later than 20 days after the date on which the agency receives the notice of violation letter, including the proposed penalty, or may make a written request for a formal administrative hearing on the determination.

(A) If an agency notified of a violation accepts DADS' determination, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(B) If an agency notified of a violation does not accept DADS' determination, the agency must submit to the Health and Human Services Commission a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to DADS is deemed acceptance by the agency of DADS' determination, is final, and waives the agency's right to a formal administrative hearing.

(C) If an agency notified of a violation fails to respond to the notice of violation letter within the required time frame, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(D) If an agency requests a formal administrative hearing, the hearing is held in accordance with the statute, §§142.0172-142.0173, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I.

(h) Other enforcement actions. DADS may propose other enforcement actions in addition to assessing an administrative penalty.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 720. 24-HOUR CARE LICENSING

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), the repeal of Chapter 720, 24-Hour Care Licensing, consisting of §§720.24 - 720.36, 720.38 - 720.46, 720.48 - 720.54, 720.56 - 720.60, 720.63, 720.65 - 720.67, 720.117 - 720.126, 720.131 - 720.137, 720.201 - 720.205, 720.207, 720.231 - 720.235, 720.237 - 720.248, 720.301 - 720.307, 720.309 - 720.319, 720.322 - 720.336, 720.361 - 720.368, 720.370 - 720.372, 720.374, 720.401 - 720.403, 720.405 - 720.423, 720.426 - 720.432, 720.440 - 720.446, 720.448, 720.449, 720.501 - 720.508, 720.512, 720.514, 720.515, 720.520 - 720.530, 720.535 - 720.537, 720.540 - 720.546, 720.548 - 720.556, 720.558 - 720.560, 720.570 - 720.574, 720.600, 720.601, 720.603, 720.605 - 720.608, 720.620, 720.701, 720.702, 720.901 - 720.923, 720.1001 - 720.1013, 720.1101, 720.1501 - 720.1506, and 720.9801. The repeals are adopted without changes to the proposal as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1912). Also in this issue of the *Texas Register*, DFPS is withdrawing the repeal of §§720.206, 720.236, 720.308, 720.320, 720.321, 720.369, 720.373, 720.602, and 720.604 because the text of these rules was inadvertently omitted from new Chapter 749, Child-Placing Agencies. The text of these rules will be added to Chapter 749 at a later date.

DFPS is required by Chapter 42 of the Human Resources Code to periodically review all minimum standard rules. In addition, part of the Child Care Licensing Division's (Licensing) business plan is to review, analyze, and update Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. The rules in Chapter 720 are repetitive and grouped according to the type of facility. DFPS is proposing to repeal this chapter, and replace it with three new chapters--Chapter 748, General Residential Operations and Residential Treatment Centers; Chapter 749, Child-Placing Agencies; and Chapter 750, Independent Foster Homes. The new chapters will facilitate understanding of the

law and Licensing requirements and are written using "plain language" techniques with a question and answer format. Rules that are easy to read and understand will result in higher rates of compliance.

The sections will function by repealing the obsolete rules and replacing them with updated rules, which will reduce the risk of harm to children and improve the quality of care based on current knowledge and practices. In addition, the new rules will be easier to understand, which should encourage voluntary compliance and reduce noncompliance caused by misinterpretation of the rules.

No comments were received regarding adoption of the sections.

SUBCHAPTER A. STANDARDS FOR CHILD-PLACING AGENCIES

40 TAC §§720.24 - 720.36, 720.38 - 720.46, 720.48 - 720.54, 720.56 - 720.60, 720.63, 720.65 - 720.67

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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SUBCHAPTER B. STANDARDS FOR AGENCY HOMES

40 TAC §§720.117 - 720.126

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER C. STANDARDS FOR HABILITATIVE AND THERAPEUTIC AGENCY HOMES

40 TAC §§720.131 - 720.137

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. STANDARDS FOR HABILITATIVE AND THERAPEUTIC FAMILY HOMES

40 TAC §§720.201 - 720.205, 720.207

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and

the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER E. STANDARDS FOR FOSTER FAMILY HOMES

40 TAC §§720.231 - 720.235, 720.237 - 720.248

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER F. STANDARDS FOR FOSTER GROUP HOMES

40 TAC §§720.301 - 720.307, 720.309 - 720.319, 720.322 - 720.336

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER G. STANDARDS FOR HABILITATIVE AND THERAPEUTIC GROUP HOMES RESPONSIBLE TO A CHILD-PLACING AGENCY AND FOR INDEPENDENT HABILITATIVE AND THERAPEUTIC GROUP HOMES

40 TAC §§720.361 - 720.368, 720.370 - 720.372, 720.374

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER H. CONSOLIDATED STANDARDS FOR 24-HOUR CARE FACILITIES

40 TAC §§720.401 - 720.403, 720.405 - 720.423, 720.426 - 720.432, 720.440 - 720.446, 720.448, 720.449, 720.501

- 720.508, 720.512, 720.514, 720.515, 720.520 - 720.530, 720.535 - 720.537, 720.540 - 720.546, 720.548 - 720.556, 720.558 - 720.560, 720.570 - 720.574

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. STANDARDS FOR ASSESSMENT SERVICES

40 TAC §§720.600, 720.601, 720.603, 720.605 - 720.608

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER J. STANDARDS FOR INSTITUTIONS PROVIDING BASIC CHILD CARE

40 TAC §720.620

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC, §42.042.

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SUBCHAPTER K. STANDARDS FOR THERAPEUTIC CAMPS

40 TAC §720.701, §720.702

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER M. STANDARDS FOR EMERGENCY SHELTERS

40 TAC §§720.901 - 720.923

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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SUBCHAPTER O. GENERAL POLICIES AND PROCEDURES

40 TAC §§720.1001 - 720.1013, 720.1101

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

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Effective date: January 1, 2007
Proposal publication date: March 17, 2006
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SUBCHAPTER S. STANDARDS FOR CHILD-CARE FACILITIES SERVING CHILDREN WITH AUTISTIC-LIKE BEHAVIOR

40 TAC §§720.1501 - 720.1506

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2006.

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Gerry Williams
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SUBCHAPTER XXXX. SUPPORT DOCUMENTS

40 TAC §720.9801

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 748. GENERAL RESIDENTIAL OPERATIONS AND RESIDENTIAL TREATMENT CENTERS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new Chapter 748, General Residential Operations and Residential Treatment Centers. New §§748.43, 748.61, 748.65, 748.67, 748.71, 748.73, 748.75, 748.101, 748.103, 748.105, 748.109, 748.131, 748.133, 748.161, 748.191, 748.231, 748.235, 748.237, 748.239, 748.303, 748.307, 748.309, 748.313, 748.315, 748.361, 748.363, 748.391, 748.393, 748.395, 748.397, 748.401, 748.501, 748.505, 748.507, 748.509, 748.533, 748.537, 748.563, 748.569, 748.571, 748.573, 748.575, 748.685, 748.721, 748.723, 748.731, 748.801, 748.863, 748.867, 748.869, 748.881, 748.903, 748.931, 748.935, 748.937, 748.987, 748.989, 748.1101, 748.1103, 748.1105, 748.1107, 748.1109, 748.1111, 748.1113, 748.1117, 748.1201, 748.1203, 748.1205, 748.1209, 748.1211, 748.1213, 748.1215, 748.1217, 748.1219, 748.1221, 748.1263, 748.1265, 748.1269, 748.1271, 748.1301, 748.1303, 748.1305, 748.1331, 748.1337, 748.1339, 748.1341, 748.1347, 748.1349, 748.1381, 748.1383, 748.1385, 748.1387, 748.1389, 748.1431, 748.1433, 748.1437, 748.1439, 748.1443, 748.1445, 748.1481, 748.1501, 748.1505, 748.1535, 748.1543, 748.1551, 748.1581, 748.1583, 748.1611, 748.1615, 748.1631, 748.1633, 748.1661, 748.1693, 748.1697, 748.1707, 748.1709, 748.1743, 748.1751, 748.1753, 748.1757, 748.1763, 748.1791, 748.1821, 748.1931, 748.1933, 748.1943, 748.1945, 748.2001, 748.2003, 748.2005, 748.2009, 748.2101, 748.2103, 748.2151, 748.2201, 748.2203, 748.2205, 748.2259, 748.2301, 748.2307, 748.2309, 748.2401, 748.2451, 748.2453, 748.2455, 748.2459, 748.2461, 748.2501, 748.2505, 748.2507, 748.2601, 748.2605, 748.2851, 748.2853, 748.2855, 748.2907, 748.2953, 748.3017, 748.3021, 748.3061, 748.3103, 748.3105, 748.3107, 748.3109, 748.3111, 748.3113, 748.3115, 748.3117, 748.3119, 748.3161, 748.3193, 748.3233, 748.3237, 748.3301, 748.3303, 748.3311, 748.3351, 748.3353, 748.3355, 748.3359, 748.3361, 748.3363, 748.3393, 748.3395, 748.3397, 748.3441, 748.3471, 748.3701, 748.3717, 748.3751, 748.3757, 748.3803, 748.3845, 748.3855, 748.3861, 748.3931, 748.4013, 748.4043, 748.4231, 748.4261, 748.4263, 748.4265, 748.4267, 748.4269, 748.4301, 748.4331, 748.4361, 748.4365, 748.4369, 748.4371, 748.4397, 748.4401, 748.4403, 748.4465, 748.4469 are adopted with changes to the proposed text published in the March 17, 2006, issue of the *Texas Register* (31 TexReg1921). New §§748.1, 748.3, 748.41, 748.63, 748.69, 748.107, 748.111, 748.163, 748.233, 748.301, 748.305, 748.311, 748.341, 748.399, 748.431, 748.433, 748.435, 748.503, 748.531, 748.535, 748.539, 748.561, 748.565, 748.567, 748.601, 748.603, 748.605, 748.607, 748.681, 748.683, 748.725, 748.727, 748.729, 748.831, 748.833, 748.861, 748.865, 748.883, 748.885, 748.901, 748.939, 748.941, 748.943, 748.945, 748.947, 748.949, 748.981, 748.983, 748.985, 748.1001, 748.1003, 748.1005, 748.1007, 748.1009, 748.1011, 748.1013, 748.1015, 748.1017, 748.1019, 748.1021, 748.1023, 748.1115, 748.1119, 748.1207, 748.1223, 748.1225, 748.1227, 748.1261, 748.1333, 748.1335, 748.1343, 748.1345, 748.1351, 748.1435, 748.1441, 748.1503, 748.1531, 748.1533, 748.1539, 748.1541, 748.1545, 748.1547, 748.1549, 748.1613, 748.1617, 748.1635, 748.1691, 748.1695, 748.1699, 748.1701, 748.1703, 748.1705, 748.1741, 748.1745, 748.1747, 748.1749, 748.1755, 748.1759, 748.1761, 748.1765, 748.1793, 748.1795, 748.1823, 748.1825, 748.1901, 748.1935, 748.1937, 748.1939, 748.1941, 748.2051, 748.2053, 748.2231, 748.2233, 748.2253, 748.2255, 748.2257, 748.2261, 748.2303, 748.2305, 748.2311, 748.2463, 748.2503, 748.2551, 748.2553, 748.2603, 748.2651, 748.2653, 748.2701, 748.2703, 748.2705, 748.2751, 748.2753, 748.2755, 748.2757, 748.2801, 748.2803, 748.2805, 748.2807, 748.2901, 748.2903, 748.2905, 748.2909, 748.2951, 748.3001, 748.3003, 748.3005, 748.3007, 748.3009, 748.3011, 748.3013, 748.3015, 748.3019, 748.3063, 748.3065, 748.3101, 748.3191, 748.3195, 748.3231, 748.3235, 748.3239, 748.3271, 748.3273, 748.3305, 748.3307, 748.3309, 748.3313, 748.3315, 748.3317, 748.3357, 748.3365, 748.3367, 748.3369, 748.3391, 748.3399, 748.3421, 748.3443, 748.3473, 748.3475, 748.3477, 748.3479, 748.3481, 748.3521, 748.3523, 748.3525, 748.3527, 748.3529, 748.3531, 748.3533, 748.3535, 748.3561, 748.3563, 748.3565, 748.3567, 748.3601, 748.3603, 748.3605, 748.3607, 748.3703, 748.3705, 748.3707, 748.3709, 748.3711, 748.3713, 748.3715, 748.3719, 748.3753, 748.3755, 748.3759, 748.3761, 748.3763, 748.3765, 748.3767, 748.3801, 748.3805, 748.3807, 748.3841, 748.3843, 748.3847, 748.3849, 748.3851, 748.3853, 748.3857, 748.3859, 748.3891, 748.3893, 748.3933, 748.3935, 748.3937, 748.4001, 748.4003, 748.4005, 748.4007, 748.4009, 748.4011, 748.4041, 748.4045, 748.4047, 748.4081, 748.4083, 748.4111, 748.4201, 748.4203, 748.4205, 748.4207, 748.4209, 748.4211, 748.4213, 748.4363, 748.4391, 748.4393, 748.4395, 748.4431, 748.4461, 748.4463, 748.4467, 748.4471, and 748.4473 are adopted without changes to the proposed text and will not be republished. Also in this issue of the *Texas Register*, DFPS is withdrawing §§748.511, 748.933, 748.1267, 748.1537, 748.1585, 748.2007, 748.2251, 748.2457, and 748.4367 because of comments received and for clarification.

DFPS is required by Chapter 42 of the Human Resources Code to periodically review all minimum standard rules. In addition, part of the Child Care Licensing Division's (Licensing) business plan is to review, analyze, and update Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. In this issue of the *Texas Register*, DFPS is repealing Chapter 720, 24-Hour Care Licensing, and replacing it with three new chapters, one of which is Chapter 748, General Residential Operations and Residential Treatment Centers.

The existing consolidated minimum standards for residential operations in Chapter 720 are outdated. The standards have not been revised since 1985. Current standards are grouped according to the type of operation where care is provided, e.g. residential treatment center, institutions providing basic care, institutions serving mentally retarded children, halfway houses, etc. There are also additional standards in separate chapters for different types of operations, including standards for emergency shelters and standards for assessment centers. The rules consolidate the minimum standards for all of these operations into a cohesive set of rules that are designed to focus on the needs of the children in care. Many of the changes are due to this consolidation.

In order to update the minimum standards, information has been obtained from providers and provider associations, Child Protec-

tive Services, and Licensing staff. Updates have also been made based on the review of available research and literature relating to the child development field, best practices in child placement, and health and safety practices recommended by experts such as the Consumer Product Safety Commission, American Academy of Pediatrics, and the Texas Department of State Health Services.

The rules will also facilitate an understanding of the law and Licensing requirements and are written using "plain language" techniques with a question and answer format. Rules that are easy to read and understand will result in higher rates of compliance.

The sections will function by reducing the risk of harm to children and improving the quality of care due to updating standards based on current knowledge and practices. In addition, the standards will be easier to understand, which should encourage voluntary compliance and reduce noncompliance caused by misinterpretation of the rules.

The DFPS Council considered public testimony concerning these rules at the meetings held January 6, 2006 and April 7, 2006. Public meetings were held September 22, 2005, October 24, 2005, and March 23, 2006, to receive comment.

During the comment period DFPS received comments from Advocacy, Inc., Austin Children's Shelter, Ben Richeys Boys Ranch, The Bridge Emergency Shelter, Buckner Child & Family Services, Cal Farley's Girlstown, Child Placement Center, Children's Home of Lubbock, Coalition for Nurses in Advanced Practice, Crisis Prevention Institute, Inc., DePelchin Children's Center, Devereux, Department of State Health Services, Executives of Texas Homes for Children, Hendrick Home for Children, High Plains Children's Home, Jonathan's Place, Medina Children's Home, Methodist Children's Home, Miracle Farm, Pathways 3H Wilderness Program, Pegasus, Roy Maas' Youth Alternatives, The Settlement Club Home, South Texas Children's Home, STARRY, State Fire Marshal's Office, Texas Alliance of Child & Family Services, Texas Baptist Children's Home, Texas Neuro Rehab Center, Texas Wood Preservers Advisory Council, Texas Forestry Association, Texas Network of Youth Services, Treated Wood Council, West Texas Boys Ranch, and Wood Preservative Science Council, and 16 individuals. A summary of the comments and responses follows:

General Comments:

General: Thirty commenters expressed general concerns about the rules in this chapter, including the fiscal impact, prescriptiveness, increased documentation requirements, and the differences between this chapter and Chapter 749, Child-Placing Agencies.

Response: The standards being proposed for adoption have been carefully considered and debated through years of workgroups, public hearings, and this last round of public comment and responses. DFPS staff have made hundreds of changes to remove financial costs, unnecessary prescription and to provide appropriate flexibility. Furthermore, DFPS will be weighting the standards relative to risk and enforcing them accordingly. DFPS staff recommend adoption of the standards as changed, believing they represent the best compromise between necessary health and safety precautions for children and the fiscal realities of providing residential child-care.

DFPS staff are making several changes to create consistency between regulations for residential child-care operations and foster homes. In many areas, however, DFPS staff are setting higher standards for residential operations, because they, by definition, care for larger groups of children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

Comments concerning specific rules:

§748.43. What do certain words and terms mean in this chapter?

Comment: One commenter requested that all definitions be moved to this rule.

Response: A printed minimum standards publication will be sent to providers and will include a comprehensive glossary.

Comment: DFPS received one comment regarding paragraph (8), child in care. The commenter expressed concern about how this definition affects an operation's liability for children in care.

Response: This definition reflects Licensing's current and future expectation regarding an operation's responsibility for a child in care. DFPS is adopting this paragraph without change.

Comment: DFPS received one comment regarding paragraph (14), diligent effort. The commenter questioned the meaning of "qualified professional" in this definition and suggested deleting the phrase "and qualifications and skills of other parties involved" from the definition.

Response: DFPS is deleting this paragraph. When this phrase has been used, it is replaced with "reasonable efforts," which has a more common meaning.

Comment: DFPS received one comment regarding paragraph (16), emergency behavior intervention. The commenter suggested defining each type of emergency behavior intervention in this rule.

Response: These definitions are in §748.2401. Also, a printed minimum standards publication will be sent to providers and will include a comprehensive glossary. DFPS is adopting this paragraph without change.

Comment: DFPS received one comment regarding paragraph (22), general residential operation, and paragraph (36), residential treatment center. The commenter suggested that the age limits be deleted from these definitions.

Response: DFPS is adopting these paragraphs with changes that delete the age limits from these definitions, changing "children up to the age of 18 years old" to "children or young adults."

Comment: DFPS received one comment regarding paragraph (26), immediate danger. The commenter expressed concern about the example in this rule of a child under 10 years old running away, stating that children older than 10 years old who run away should also be considered as in "immediate danger."

Response: The definition indicates that immediate danger may include children under 10 years old running away. This would not prohibit an operation from assessing that a child older than 10 years old is in immediate danger if they run away. DFPS is adopting this paragraph without change.

Comment: DFPS received one comment regarding paragraph (37), residential treatment center. The commenter requested that residential treatment centers be deleted so that all operations have the option to provide a continuum of care.

Response: This definition does not preclude an operation from having separately licensed programs and transferring children between those programs as appropriate. DFPS is not making changes as a result of this comment.

Comment: DFPS received five comments regarding paragraph (46), treatment director. The comments stated it was cost prohibitive in some instances to have a treatment director with no other responsibilities, and the treatment director needed to have the ability to assign the responsibilities to others.

Response: This definition is adopted with an additional sentence that clarifies the flexibility that an operation has in assigning treatment director responsibilities.

In addition to changes resulting from comments, DFPS is adopting §748.43 with the following changes:

Paragraph (1), Accredited college or university, is adopted with changes to more accurately reflect the federally recognized accrediting bodies for the United States.

Paragraph (24), health-care professional, is adopted with changes to be more consistent with other state agency rules governing health-care professionals. The Board of Nurse Examiners recommended this change.

Paragraph (48), volunteer, is revised in response to several comments regarding other rules related to volunteers. The definition is now limited to those volunteers who provide care or have unsupervised access to children in care. There are many volunteers who do not have contact with children and/or only volunteer for a single event. The definition is changed so that the requirements and limitations related to volunteers contained in other rules will only apply to those volunteers who have contact with children, and therefore potentially impact the health and safety of children in care.

§748.61. What types of services does Licensing regulate?

Comment: DFPS received four comments regarding this rule. One commenter complimented this rule. One commenter made a suggestion about adding "wrap around treatment services." One commenter requested a clarification regarding assessment services. One commenter expressed concern that the definitions of treatment services do not capture enough children and should be broader.

Response: DFPS is adopting this section with changes to correct an inconsistency with another rule by changing the minimum age for transitional living services to "14 years old". Also, "assessment services" is changed to "assessment services program" to clearly distinguish this specific set of services from routine assessments. DFPS is not revising the rule as a result of the second or fourth comment. Wrap around treatment services can be provided within these rules. A different type of "wrap around services" is not required. The definition of treatment services has already been changed based on previous input.

§748.63. Can I provide each type of service that Licensing regulates?

Comment: DFPS received three comments. Two commenters expressed concern about how the new system of listing services on a General Residential Operation license would affect operations, particularly regarding liability insurance. One commenter made a suggestion about adding "wrap around treatment services."

Response: DFPS is adopting this rule without change. Operations will need to carefully consider which services they can appropriately provide and offer. Some operations that have intermittently provided treatment services to children in the past, may choose not to provide it now. The proposed rules for "child-care services only" are written to address all children who will not qualify for treatment services. Since the criteria for "treatment services" under the proposed rules are very stringent, particularly those related to emotional disturbance, there are many children who will not meet the criteria for "treatment services" but will still have treatment needs that must be addressed. For example, a child with ADHD may have special treatment needs, such as needing an individualized behavior management plan, but will not qualify for "treatment services" with only an ADHD diagnosis. In this example, an operation that only has a license to provide "child-care services" may serve this child with treatment needs.

§748.65. What children are eligible to participate in a transitional living program?

Comment: DFPS received one comment, pointing out that the rules are inconsistent regarding the minimum age for children in a transitional living program.

Response: DFPS is revising the rule to clarify that children are generally eligible for transitional living at the age of 14 years old, but are only eligible for transitional living that involves decreased supervision at the age of 16 years old.

§748.71. May I have an independent living program?

Comment: One commenter requested that independent living programs be allowed.

Response: DFPS is not revising the rule as a result of the comment. Licensing does not have jurisdiction over living situations in which young adults live independently. However, we are permitting transitional living programs in which children live with decreased supervision. DFPS is adopting the rule with an editorial change to match Chapter 749, Child-Placing Agencies.

§748.103. What are my operational responsibilities as the permit holder?

Comment: DFPS received two comments, both questioning the terms "plan" and "controlling person" used in the rule.

Response: DFPS is adopting this section with a change. DFPS is deleting the subsection that refers to a "plan," as the plan is not required for operations regulated under this chapter. DFPS is also clarifying the paragraph (12) that refers to controlling persons to be more consistent with language in Chapter 745, Licensing. The printed minimum standards will also contain a reference to further information in Chapter 745 regarding controlling persons.

§748.105. What responsibilities do I have for personnel policies and procedures?

Comment: DFPS received one comment suggesting that specific training requirements related to emergency behavior intervention be added to this rule.

Response: DFPS is not revising the rule as a result of the comment. Training requirements regarding emergency behavior intervention are already included in other rules specifically related to training. However, DFPS is adding the following phrase to the

rule: "Develop written policies on whether your operation permits individual caregivers to take children away from the operation for day or overnight visits." This addition is taken from the current minimum standards, and is needed to clarify other relevant standards in this chapter.

§748.109. May I exceed my operation capacity?

Comment: DFPS received eight comments. The commenters expressed concern about the requirement to include children of caregivers in the operations capacity. They were especially concerned about reducing the number of beds available for children admitted for care.

Response: DFPS is adopting this section with a change to require that children of caregivers be counted in the operation's capacity only "if they share general living space, bedroom, and/or bathroom space with children in care." One other minor edit is also made.

§748.131. What are the specific responsibilities of the governing body?

Comment: DFPS received two comments. One commenter asked that the rule be revised so that the governing body is responsible for "overseeing" but not "ensuring" that the operation's services and programs comply with operation policies. Another commenter requested that "family member" be defined as it relates to this rule.

Response: Licensing does intend that the governing body "ensure" that operation services and programs comply with policies. Based on comments, DFPS is clarifying the term "family members," including inserting a definition at §748.43(17). DFPS is adopting this section with change.

§748.161. What are my fiscal requirements?

Comment: DFPS received two comments, both expressing concern about the requirement to give a child his money at the time of discharge, stating that the operation may need time to reconcile the child's account.

Response: DFPS agrees with the commenters and is adopting the rule with a change to allow the operation up to 30 days after discharge to give/send the child his money.

§748.191. What items must I post at my operation?

Comment: DFPS received 10 comments. The commenters expressed concern about the required postings. They were concerned about the prescriptiveness of the requirements and the potential of the requirements to "institutionalize" operations that use a cottage home model.

Response: DFPS is adopting this section with changes. In paragraph (4), the requirement for a posted schedule is clarified to require a "general" daily schedule. An example of this will also be added to the printed minimum standards. Paragraph (5), regarding posting emergency phone numbers, is deleted.

§748.231. What are the general requirements for my operation's policies?

Comment: DFPS received nine comments. The commenters stated that the operation should have the right to change policies throughout the year without having to notify Licensing of every change. Some commenters suggested that an annual policy update submitted to Licensing would be sufficient.

Response: No change is made based on the comments. Per subsection (a) of this rule, the requirements of the rule only apply to policies required by this chapter. Licensing must be aware of policy changes related to requirements of this chapter, in order to ensure that the policies meet minimum requirements. Also, the rule only requires that policy changes be submitted to Licensing before the changes are implemented, not that Licensing approve the changes before they are implemented. DFPS is adopting the rule with a change to delete the subsection requiring the governing body to approve policies, as this is already required in a different rule.

§748.233. What are the requirements for my admission policies?

Comment: DFPS received two comments. The commenters requested that the admission policy requirements be revised to include characteristics of children the operation "primarily" serves and the conditions under which the operation would serve children "with higher or lower levels of needs."

Response: Although these rules offer operations the opportunity to provide a greater continuum of care, operations must offer multiple services in a planned and organized fashion. An operation must have a suitable plan and program in place for providing a specific type of treatment or programmatic service, including admission policies, before admitting a child who requires that type of service or program. DFPS is adopting this section without change.

§748.235. What child-care policies must I develop?

Comment:

(1) DFPS received seven comments expressing concern that this rule prohibited discipline of toddlers, stating that discipline as defined in this chapter is appropriate for toddlers.

Response: DFPS is adopting this rule with a change to delete the reference to toddlers, so that only discipline of infants is prohibited.

(2) One commenter expressed concern about the requirement to have a policy listing the "program expectations and rules for children," stating that it is not possible to keep a written list of all rules and maintain governing body approval of them all.

Response: DFPS is clarifying this rule based on the comment. The rule will require program expectations and rules "that apply to all children." The operation is not prevented from having separate, additional rules for specific children or specific living units as needed.

DFPS is making additional clarifications to §748.235. DFPS is clarifying that an operation that does not allow emergency behavior interventions must still have a policy disallowing their use. DFPS is also adding policy requirements from other rules of this chapter relating to weapons at the operation and disasters and emergencies.

§748.237. What emergency behavior intervention policies must I develop if the use of emergency behavior intervention is permitted at my operation?

Comment: DFPS received five comments: with two supporting the rule and offering suggestions, and three expressing concern or providing suggestions regarding this rule, including concern about the applicability to operations that do not allow emergency behavior intervention, concern about the requirement to obtain each child's input on preferred de-escalation techniques, and a suggestion to broaden the scope of evaluations of caregivers qualified in behavior intervention to include an evaluation of their

understanding of all risks involved in emergency behavior interventions, not just risks associated with prone restraints.

Response: DFPS is adopting this section with changes based on comments. The phrase "if the use of emergency behavior intervention is permitted in my operation" is added so that it does not apply to those operations that do not allow emergency behavior interventions. In order to clarify training and caregiver qualification requirements, DFPS is deleting the reference to evaluations of risks associated with prone and supine restraints in paragraph (3). These training requirements are specifically addressed in §748.901, along with other required emergency behavior intervention training content. DFPS is not revising the subsection requiring the operation to obtain each child's input on preferred de-escalation techniques. This is a recommendation of Child Welfare League of America and can be a valuable tool in decreasing emergency behavior interventions.

§748.239. What policies must I develop if I use volunteers?

Comment: DFPS received two comments expressing concern about fulfilling the requirements of this rule for large volunteer groups that do not provide care or have unsupervised access to children.

Response: DFPS is not revising the section based on the comments because the definition of "volunteer" in §748.43 was changed to address the commenters concerns. DFPS is clarifying that volunteer policies must "address visitation with children in care," which is a current minimum standard requirement.

§748.303. When must I report and document a serious incident?

Comment: DFPS received four comments. One requested that operations be required to report incidents that occur at on-campus charter schools. The other commenters either stated that Licensing was being too prescriptive or was not being clear enough.

Response: DFPS is not revising this rule as a result of comment. Licensing cannot require serious incident reports for events that occur at an on-campus charter school, as Licensing has no jurisdiction related to charter schools. Licensing reviewed the requirements and examples provided in this rule and determined that the language is sufficiently clear. DFPS is adding clarifications regarding reporting the removal of a child by an unauthorized person, and adding several requirements of §748.307 so that all serious incident reporting requirements are in the same rule.

§748.307. When must I report other occurrences?

Comment: DFPS received 10 comments. Comments included concern that one requirement of the rule contradicts another rule, one requirement is not required in Chapter 749, and some requirements are not "serious incidents". Three commenters were particularly concerned about the requirement to report suspected drug use of a person who cares for or has access to children at the operation.

Response: DFPS is not revising the rule based on the comments regarding the requirement to report suspected drug use of a person who cares for or has access to children at the operation. This requirement is legislatively mandated. DFPS is adopting the rule with changes, including moving the relevant paragraphs to §748.303, so all serious incident reporting requirements will be in the same rule. DFPS is also deleting two paragraphs because they are already addressed in other rules in this chapter. DFPS is also adding the requirement to report medically pertinent incidents. Other changes are also made.

§748.311. How must I document a serious incident?

Comment: DFPS received two comments. One questioned when serious incidents must be documented in writing because only some incidents have to be reported in writing to Licensing. Another commenter asserted that the documentation requirements should be revised based on information that DFPS would already have about a child in care.

Response: All serious incidents must be documented in writing. In addition, some occurrences in §748.307 require written reports to Licensing. Also, Licensing needs information about the child to timely determine whether an investigation into the incident is needed. Licensing may have partial information available if the child is placed by Child Protective Services, even then the information may not be timely. DFPS is adopting this section without change.

§748.315. Where must I keep incident reports?

Comment: DFPS received two comments. The commenters expressed concern about having serious incident reports accessible to caregivers, as some reports may involve allegations of caregiver abuse/neglect.

Response: DFPS is deleting the requirement that serious incident reports be accessible to caregivers and adding that reports must remain on file at the operation for at least two years.

§748.363. What information must the personnel record of an employee include?

Comment: DFPS received one comment. The Department of State Health Services (DSHS) submitted extensive written comments regarding the tuberculosis screening and reporting requirements in this chapter.

Response: DFPS is adopting this section with a change to reference §748.1583, (relating to Who must have a tuberculosis (TB) examination?). Section 748.1583 is significantly revised in accordance with DSHS recommendations. One other editorial change is also made.

§748.391. What is an active child record?

Comment: DFPS received two comments. One commenter questioned what an "active child record" means. Another commenter questioned how the previous 12 months of information on a child in care can be maintained if the child has been in the operation for less than 12 months.

Response: Based on the comment, DFPS is adopting this rule with some minor clarifications regarding the definition of an active child record. However, DFPS believes that the rule is sufficiently clear that record keeping requirements apply only to the child's records when the child was at the operation.

§748.393. How must I maintain an active child record?

Comment: DFPS received two comments. One commenter asked about where files must be stored if an operation has multiple locations, and another commenter asked about the necessity of a client identifier other than the child's name.

Response: DFPS is not revising the rule based on comments. The rule specifies that the child's record must be kept "where the child is receiving services." Also, a second client identifier is required so that children with the same or similar names can be clearly distinguished. DFPS is, however, adding "chronic health

conditions" as information required to be clearly visible on and/or in the child's record, and changing the "signature of employees" making an entry into the record to "name of the employee."

§748.395. How current must a child's record be?

Comment: DFPS received three comments. Two commenters expressed concern about having monthly casework documentation in the record within the required 30 days. One commenter expressed concern about receiving paperwork from outside entities within 30 days.

Response: DFPS is revising the rule to state that documentation can be in the record "within 15 days from the end of the month for monthly summaries." DFPS is not revising the rule because of the comment about receiving paperwork from outside entities. Other rules throughout the chapter have specific time frames for paperwork from outside entities and/or include specific provisions for documenting efforts to obtain the paperwork.

§748.397. Who must consent to the release of a child's record?

Comment: One commenter asked about releasing records in response to court subpoenas or to Advocacy, Inc.

Response: DFPS is adopting the section with the addition that records must be released "as required by law."

§748.399. Must I make records available for Licensing to review?

Comment: DFPS received two comments. One commenter expressed concern about Licensing having "unlimited access to records" or taking copies of records without "signing them out." One commenter requested an editorial change.

Response: DFPS is adopting this section without change. The legal authority of Licensing to regulate operations includes review of operation records. Licensing may also copy records as part of its regulatory authority, and is not required by law to document for the operation what records were copied or for what purpose. Regarding the requested editorial change, DFPS believes that the rule is sufficiently clear as written.

§748.401. How must I maintain a child's record that is not active?

Comment: One commenter requested that operations have 72 hours to retrieve archived records, rather than 24 hours.

Response: DFPS is changing the time frame for retrieving archived records to 48 hours. The revised time frame should be sufficient time to retrieve archived records without unduly delaying Licensing inspections or investigations. The same change is made to §748.361.

§748.433. How long must I maintain child records? Comment: DFPS received two comments. One commenter stated that maintaining records for two years will require additional storage space, and another commenter requested clarification of the rule.

Response: This chapter allows for electronic storage of archived records, which would take very little storage space. Licensing believes that the rule is reasonable and sufficiently clear as written. DFPS is adopting this section without change.

§748.501. What must my written professional staffing plan include?

Comment: DFPS received five comments. The commenters recommended deleting paragraphs (2) - (5), stating that the organizational chart and job descriptions cover this.

Response: The professional staffing plan provides an overall picture of how tasks are divided between the professional staff. This is qualitatively different from information in various job descriptions. However, DFPS is deleting paragraphs (3) and (5) because they are adequately addressed elsewhere, and clarifying that the staffing plan must be implemented.

§748.505. What minimum qualifications must all employees meet?

Comment: DFPS received three comments. One commenter felt that portions of the rule are too open to interpretation and suggested deleting them. One commenter asked for clarification regarding the method to assure that there is no danger presented to children in care and who makes this determination. Comments were also received from the Department of State Health Services regarding tuberculosis screening requirements.

Response: DFPS is adopting the rule with a change to subsection (b)(2) regarding tuberculosis screening to refer to §748.1583, as this rule has been extensively revised according to DSHS comments. No change is recommended based on the other comments. Most of this rule is taken from current minimum standard rules.

§748.507. What general responsibilities do all employees have?

Comment: DFPS received six comments. One commenter said paragraph (3) is not a reasonable expectation of an employee, especially for those facilities that have multiple licenses. Five commenters recommended amending paragraph (3) by inserting "Employees who have unsupervised contact with children" must.. The training for "all" employees (i.e. maintenance, clerical, custodial etc.) would be very expensive and time consuming.

Response: DFPS is making a minor editorial change, but is not revising the rule as a result of comments. The word "applicable" is used in this paragraph to indicate that staff only need training on those rules and portions of the law that are pertinent to their job. DFPS believes that this training expectation is reasonable.

§748.509. What are the requirements for tuberculosis screening?

Comment: DFPS received seven comments. Two commenters asked that volunteers not be required to have a TB test. Comments were also received from the Department of State Health Services regarding tuberculosis screening requirements.

Response: DFPS is adopting this rule after revising it to refer to §748.1583, as this rule has been extensively revised according to DSHS comments. Regarding the two commenters who requested that volunteers not be required to have a TB test, the definition of volunteer has been changed in §748.43 to refer to only those who provide care for children or who have unsupervised access to children. Therefore, TB screening will continue to be required for volunteers who meet this definition.

§748.533. Can a child-care administrator be an administrator for two residential child-care operations?

Comment: One commenter expressed concern that this rule is too prescriptive and is not consistent with Chapter 749.

Response: DFPS is adopting this rule with changes, including changing the limit for a child-placing agency managed by the Licensed Administrator for a facility from 20 foster homes to 25 foster homes, adding that the person must be a Licensed Child-Placing Agency Administrator if also managing a child-

placing agency, and making several editorial changes. The revisions and edits are primarily designed to clarify the rule requirements and make the rule more consistent with Chapter 749. The change from 20 to 25 foster homes, as the limit for a child-placing agency, is designed to offer operations more opportunity to use this option without compromising the intent to ensure that the management of two operations remains a reasonable workload for the Licensed Administrator.

§748.535. What responsibilities must the child-care administrator designated to be responsible for the on-site administration of the operation have?

Comment: One commenter expressed concern about the requirement to ensure that persons whose behavior or health status presents a danger to children are not allowed at the operation.

Response: This is current rule and a reasonable expectation for a Licensed Administrator. DFPS is adopting this section without change.

§748.561. What professional level service activities must a professional level service provider perform at my operation?

Comment: DFPS received four comments. One commenter asked for clarification of the rule. One commenter felt that more highly qualified staff will have to be hired, which will be costly and difficult, particularly in rural settings. The commenter recommended that current staff requirements for basic care facilities remain as they are. One commenter disagreed with this rule and with the fiscal impact estimate and recommended deleting the rule or relating the need for this person to the size of the facility. One commenter felt a non-professional service level provider can complete some tasks assigned to professional level service providers if this person is supervised by a professional level service provider.

Response: This rule applies to all operations. DFPS believes the rule is clear and the professional staff requirements are reasonable, important in providing safe and appropriate care for children, and outweighs the fiscal impact. DFPS is adopting the section without change.

§748.563. What professional qualifications must a professional level service provider have in order to perform professional level service activities?

Comment: DFPS received five comments. Regarding subsection (a), one commenter felt that, for larger operations, the 30% rule is far more children than 25 and this hampers their ability to care for children that they deem appropriate for the services that provided. The commenter recommended changing the requirement to 30% of the children in your care. One commenter requested the addition of nurses in this category and to consider bachelor's degree plus years of experience, working under supervision of master's level person. One commenter recommended a bachelor's degree from an accredited college or university and one year of documented full time work experience in a residential child-care operation or related field; as long as a professional level service provider supervises this person. One commenter requested an editorial change.

Response: DFPS is adopting the rule with the following option added to the educational qualifications in subsection (a): "A nurse's degree or higher if providing treatment services to children with primary medical needs." DFPS is also making one minor editorial change, per the last commenter's request. However, the language regarding the 30% rule was purposefully crafted by Licensing, and the numbers have already been revised in response to previous provider input. The option for a bachelor's degree is already contained in subsection (c).

§748.569. Must I have health care professionals on staff or on contract if I provide services to children with primary medical needs?

Comment: DFPS received one comment. The commenter questioned whether this applied to agencies that have 25 or more children with primary medical needs or any agency that has even one child with primary medical needs? The commenter stated that facilities with a small number of children should be able to have a contract nurse that is available for emergencies and as needed. The Board of Nurse Examiners also recommended changes to the rule to ensure it met the requirements of law.

Response: DFPS is revising the rule as a result of comments. The rule now states that only facilities which "provide treatment services to 25 or more children with primary medical needs, or if more than 30% of the children in your care receive treatment services for primary medical needs" are required to meet this rule. The same change is made in §748.573. Per the Board of Nurse Examiners, DFPS is also revising the rule to clarify that licensed vocational nurses must have "appropriate supervision as defined in Tex. Occ. Code §301.353."

§748.571. What are the responsibilities of a registered nurse at an operation that provides services to a child with primary medical needs?

Comment: DFPS received two comments. One commenter suggested adding to the registered nurse's responsibilities, the responsibility for monitoring for signs of distress during any episode of restraint. One commenter felt this rule needs to be clarified, as it does not seem clear if a basic level facility that has one child with medical needs must meet the requirements of the rule. This is costly and will be a disincentive for basic facilities to keep these children. The Board of Nurse Examiners recommended changes be made to meet requirements in the law.

Response: All staff must be trained in providing monitoring for children in restraint. Requiring that only a nurse provide this monitoring would create a fiscal impact for many operations. The issue of which facilities must have a nurse was clarified in §748.569. DFPS is adopting this rule with several changes based on the recommendations of the Board of Nurse Examiners.

§748.575. In what circumstances may a physician or registered nurse (including an advanced practice registered nurse) delegate nursing tasks to unlicensed caregivers?

Comment: DFPS received four comments. One commenter stated this regulation has the potential to conflict with areas outside licensing jurisdiction. Two commenters felt the language related to physician or nurse delegation of nursing tasks to unlicensed nursing personnel is more appropriately governed by medical professional rules. One commenter stated when a parent leaves a hospital with a medically needy child, it is not considered a physician delegating nursing to unlicensed personnel - it is a health care professional giving instructions to a caregiver - language is not appropriate - puts physician and caregiver at risk. One commenter questioned what qualified as performing a nursing task. The Board of Nurse Examiners recommended significant changes to this rule to meet the requirements of law and policy.

Response: DFPS is revising the rule based on comments.

§748.601. Must I have a treatment director?

Comment: DFPS received two comments. One commenter asked for clarification if a treatment director is needed for an operation serving basic care children and to please define "treatment services". One commenter felt the concept of having a treatment director, a professional level service person, and a licensed childcare administrator is redundant and was not addressed in the fiscal impact study.

Response: The definition of treatment services is clarified in §748.43(46), which discusses the flexibility of a treatment director's responsibilities. The three different professionals have three very different jobs. Also, the rules do not prohibit any of the persons in these positions from having other job duties. Therefore, a very small operation could theoretically have one person serving in all three roles. DFPS is adopting this section without change.

§748.603. What are the responsibilities of a treatment director?

Comment: DFPS received two comments. One commenter suggested rewording or deleting this rule completely. One commenter was strongly supportive of the rule.

Response: This rule includes important information about the required duties of a treatment director. The requirements are appropriate and necessary to ensuring the well-being of children in care. DFPS is adopting this section without change.

§748.605. What qualifications must a treatment director have?

Comment: One commenter felt the requirement for nurses to be treatment directors for operations serving children with primary medical needs was not practical in all parts of the state and recommended adding paragraph (2), stating "A licensed social worker with hospital or other medical experience and must contract with a nurse or physician for consultation and service plan reviews."

Response: DFPS believes this requirement is reasonable and that treatment directors should reflect the population being served by the operation. DFPS is adopting this section without change.

§748.681. What minimum qualifications must a caregiver meet?

Comment: DFPS received five comments, all related to the minimum age for caregivers. One commenter recommended deleting the rule since it could place a burden on facilities that are already experiencing a labor shortage, also stating that qualifications should be based on knowledge and abilities. One commenter felt that the requirement that caregivers be 21 years old if at least one child in the group the caregiver serves is 13 years old or older exceeds Council on Accreditation standards and should not be a minimum standard. One commenter felt the age of a caregiver should be left to the discretion of the facility. One commenter felt the required age of the caregiver could cause additional costs for some programs. The commenter was concerned that this discriminates against rural areas and areas of the state with fewer qualified people in the labor pool. One commenter questioned why the requirements were so low and that the minimum age for all caregivers should be raised to 21 since many personnel problems come from younger, less mature employees.

Response: Most of this rule is taken from the current minimum standard on qualifications of caregivers. A review of other states supported the requirement that the age of caregivers be raised. DFPS is adopting this section without change.

§748.683. What are the general requirements for supervising caregivers?

Comment: DFPS received two comments. One commenter felt the rule was too open to interpretation. One commenter felt the requirements were too low.

Response: This rule is taken from current minimum standards. Operations can raise the standards with their own policies and rules. DFPS is adopting this section without change.

§748.685. What responsibilities does a caregiver have when supervising a child or children?

Comment: DFPS received 13 comments. All commenters felt the rule micromanaged the caregiver's responsibility for supervising children, especially those receiving basic care services, and recommended that sections be deleted or changed that referenced auditory or visual awareness of children's activities.

Response: DFPS is adopting this section with the following changes: deleting the requirement of "directing each child's activities or actions," deleting the requirement to "not perform tasks that conflict or interfere with caregiver responsibilities and clearly impede the caregiver's ability to supervise and interact with the children," deleting the requirement to provide a "contained" environment, and adding requirements when children have overnight visits with staff. Subsection (a)(4) regarding audio or visual awareness is not recommended for revision, as it indicates that this is required "as appropriate."

§748.721. What are the requirements for a volunteer?

Comment: DFPS received six comments. Five commenters stated that volunteers who are not counted in the child/staff ratio do not need to be governed by this standard. One commenter stated subsection (a) does not match the requirements in Chapter 749 and recommended there be clear distinctions between volunteers who act in the place of caregivers and those who come in groups and relate to children under staff supervision. The commenter felt no volunteer should be drug tested.

Response: The definition of volunteer is changed to apply only to those who provide care for children or who have unsupervised access to children. This should address most of the commenter concerns. With this revised definition, it is appropriate to require drug tests for volunteers, as volunteer drug use could directly impact the health and safety of children in care. This rule is exactly the same as §749.761. DFPS is not revising the rule based on comments, but is deleting the reference to student interns.

In addition, references to student interns are deleted, because interns are already regulated as volunteers or as staff.

§748.731. Can I use "volunteers" referred for community service through the courts as an alternative to incarceration or as a condition of probation?

Comment: DFPS received six comments. All commenters recommended allowing these volunteers as long as they have not been convicted of specific types of crimes. The commenters felt their agencies receive valuable services preformed by individuals from teen courts and other programs and noted that services are often made available to a non-profit agency through county courts for clean up and improvement of facilities.

Response: DFPS does not agree with the comments. Persons referred for community service through the courts because of

criminal activity, whether it is an alternative to incarceration or as a condition of probation or parole, should not be around children in care. This rule is being edited since the definition for "volunteer" has been changed to be narrower.

In addition, references to student interns are deleted, because interns are already regulated as volunteers or as staff.

§748.861. What are the pre-service experience requirements for a caregiver?

Comment: DFPS received two comments. One commenter strongly agreed that there must be adequate pre-service training for new employees to prevent children being put at risk. One commenter asked that treatment services be defined.

Response: Treatment services are defined in §748.61. DFPS is adopting this section without change.

§748.863. What are the pre-service hourly training requirements for caregivers and employees?

Comment: DFPS received 16 comments. Three commenters believed the proposed change would significantly increase the cost of care without affecting child safety and well being. Eight commenters felt that the rule required too much training and/or was too prescriptive. Two commenters suggested more or stricter training requirements. Six commenters said there is a significant difference between requirements for facilities and child-placing agencies.

Response: DFPS is adopting the rule with changes, including a reduction from 16 to 8 hours of pre-service training regarding emergency behavior intervention for all caregivers in operations that prohibit the use of emergency behavior intervention and for child care administrators, professional level service providers, treatment directors, and case managers; reorganizing the training requirements in a chart for clarification purposes; and editorial changes.

§748.867. Must I provide pre-service training to a caregiver or an employee who has previously worked in an operation?

Comment: One commenter believed these proposed changes would significantly increase cost without affecting child safety and well-being.

Response: DFPS believes this rule is reasonable and necessary to protect children, and is not revising the rule because of comment. DFPS is, however, making minor editorial changes. Regarding fiscal impact, DFPS has lowered the hours of pre-service training required in §748.863. This rule provides another exception for pre-service training, when a caregiver or employee has previously worked in an operation so this rule will have no fiscal impact.

§748.869. What are the instructor requirements for providing pre-service training?

Comment: DFPS received nine comments. One commenter commended DFPS for including the requirement that pre-service training on emergency behavior intervention must be competency based. This commenter also suggested changing the requirement to require a certified instructor. One commenter asked what the term "recognized" method of emergency behavior intervention means. One commenter agreed with the rule, but believed the fiscal impact was underestimated. Five commenters recommended that in subsection (b), the words "or an approved multi-media presentation" be added to allow an alternative to instructor led. These commenters also wanted to delete the requirement in subsection (c) for operations that had house parents that a health care professional or pharmacist must provide training in administering psychotropic medication and the trainer must assess each participant after the training to ensure the learning. The houseparents attend the doctor appointments with the children in their care and receive the training at the appointments.

Response: Regarding the fiscal impact, the estimated fiscal impact of $0.01 for every hundred dollars in sales per facility is not an underestimation of the costs. Except for the requirement that the training for caregivers that deliver psychotropic medications be delivered by a health care professional or pharmacist, the other instructor requirements are required by current minimum standards and do not have a fiscal impact. The survey that was sent out to the operations only related to the psychotropic training by health care professionals, which is an addition to the standards. The survey indicated that 70% of the responders already comply with this rule (including operations that contract with Child Protective Services), and the rule didn't apply to another 10%. For the 20% that don't already comply with this new minimum standard, compliance should not be difficult. Some operations may have health care professionals that can provide this training in-house. While the estimated fiscal impact is low, it should adequately cover the costs that may arise. The fiscal impact applied a $20 hourly rate for a nurse trainer to the hours of training currently provided, based on the assumption that the number of hours offered is adequate and will not change. This determination was used because the rule does not require a minimum number of hours for training, but only requires a health care professional to conduct the training. DFPS is adopting this section with editorial changes.

§748.881. What curriculum components must be included in the general pre-service training?

Comment: DFPS received three comments. Two commenters felt the level of detail would hinder a facility from having enough resources to properly implement their model of care and that the requirements are too prescriptive and not on the cutting edge of what is considered best practice, and recommended keeping current pre-service training requirements. One commenter asked for clarification if there is a minimum time for curriculum components in pre-service training.

Response: DFPS believes these requirements are reasonable and necessary. The required pre-service training components are what is minimally needed for a caregiver. There is no minimum time for curriculum components. DFPS is adopting the section with editorial clarifications.

§748.883. If your operation cares for children younger than two years old, what additional curriculum components must be included in the general pre-service training?

Comment: One commenter endorsed adding the training on shaken baby syndrome and SIDS because they are related to child safety, but believed that training on early brain development is not and recommended removing it.

Response: This is a one-time pre-service training requirement and is reasonable to expect for those who care for very young children. DFPS is adopting this section without change.

§748.901. If I do not allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

Comment: DFPS received three comments. One commenter recommended that the rule include training and re-testing on emergency behavior intervention every 6 to 12 months and include training on risks of all restraints, and adding education on all risks of restraints including physical, psychological, and social. One commenter supported the requirement for training and strengthening the standards and also supported the focus on early identification of potential problem behaviors and strategies. One commenter felt the list is too prescriptive and does not allow operations enough time to train on their own program model and policies and that all the specific components should be deleted.

Response: Adding requirements to the rule would be a fiscal impact for many operations, and current training requirements capture the information sufficiently. The list of training components in this rule is taken from the current minimum standards. DFPS is adopting this section without change.

§748.903. If I allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

Comment: DFPS received eight comments. One commenter supported the rule and felt strengthening the requirements was justified. Two commenters felt the list of components was too prescriptive and would hinder a trainer and recommended deleting the specific hour requirement on how many should focus on early identification. Five commenters requested the phrase "at least 12 of the 16 hours of the pre-service training curriculum regarding emergency behavior intervention must focus on early identification" and replace it with the word "it" to be in harmony with §748.863.

Response: DFPS is adopting this section with changes. The number of hours for caregivers not providing treatment services is decreased and moved to §748.863. The 12 of 16 hours phrase is changed to "75% of required training hours." However, changes to the curriculum components are not being made because many of them were already required by minimum standards, and the additions are safety-based.

§748.931. What are the annual training requirements for caregivers and employees?

Comment: DFPS received 22 comments. Four commenters felt the proposed change would significantly increase the cost of care. One commenter felt that the requirement of two hours every 90 days would take too much time and money and recommended keeping the current standards. Nine commenters felt that the rule required too much training and/or was too prescriptive. One commenter suggested more or stricter training requirements. One commenter supported the rule requirements. Two commenters noted there are significant differences between the requirements in this rule and the requirements for child-placing agencies. One commenter felt the addition of training requirements for staff who are not caregivers does not take into account the person's experience and job duties. The commenter also recommended deleting the requirement that 15 hours of the training pertain to the role and responsibility of the person's position. One commenter recommended deleting the rule regarding non-caregivers. Five commenters felt that the category of staff is not clearly defined and could be misinterpreted. These commenters also recommended deleting the requirement for programs that do not allow restraints.

Response: DFPS is adopting this section with changes based on the comments. DFPS is (1) reducing the requirement for training of caregivers that are not providing treatment services (for less than 25 children and less than 30%) from 34 hours to 20 hours; (2) changing the requirement for two hours of emergency behavior intervention training every three months to four hours every six months; (3) reducing the requirement for training of caregivers that are providing treatment services (for more than 25 children or more than 30%) from 54 hours to 50 hours; (4) clarifying the language of "staff working with children, who are not caregivers", by listing the individuals that the rule applies to; (5) reducing the number of training hours for staff that are not caregivers from 30 hours to 20 hours; (6) deleting the requirement that half of the hours of training for staff that are not caregivers had to "pertain to the role and responsibility of the person's position", and (7) making the rule more readable and user friendly by combining this rule and §749.933 (now deleted) and incorporating them into a chart. These changes should eliminate any fiscal impact (with the exception of item (2), which was discussed in the initial fiscal impact analysis and which will be reduced by the change to four hours every six months), because the rules will now either be consistent with current standards, or for those that require additional hours of training, they are consistent with the contract requirements of Child Protective Services.

§748.935. When must a person complete the annual training?

Comment: One commenter recommended that for ease in record keeping, operations whose fiscal year begins other than January 1 should be given the option of using the beginning of their fiscal year.

Response: DFPS is adopting this section with change based on the commenter's recommendation.

§748.937. What types of hours or instruction can be used to complete the annual training requirements?

Comment: DFPS received seven comments. Two commenters felt that if the rule included not allowing on-line instruction, there was a concern since on-line training is an accepted practice in education. The commenter recommended clarifying the use of computer aided and on-line courses. One commenter recommended that the percentage of time allowed for instructional training be deleted since that might be impractical for part-time staff. This commenter also recommended allowing staffings to meet training requirements if they met the same requirements of other approved trainings. One commenter disagreed with the rule and recommended that the 16 hours of required pre-service crisis intervention training to count toward annual training hours. Two commenters felt that it should be allowed for the training to be incorporated with staffings. One commenter felt that the presenters of training should get training credit for preparation and presentation to others. One commenter asked that the pre-service and orientation training count toward the first year's annual training.

Response: DFPS is adopting the rule with changes. Subsection (e) is added to the rule and states, "If a person earns more than the minimum number of training hours required during a particular year, the person can carry over to the next year a maximum of 10 training hours." The rule is also clarifies that for the different types of annual training that may be used, those trainings must comply with the rule requirements in this division. Other editorial changes were made. A training and a staffing are for different purposes, so a staffing cannot be used as training. Computer aided or on-line training is not precluded per se. They can be used for self-instructional training, or if the training is instructor led. DFPS is not adopting changes regarding the last two issues.

§748.939. Does Licensing approve training resources or trainers for annual training hours?

Comment: DFPS received three comments. One commenter felt that the rule really limits what can be used for training and suggested that the rule be deleted and replaced with "all training must be documented and relate to the staff's duties." One commenter recommended that DFPS create a provider list of nationally recognized providers for emergency behavior intervention training. One commenter felt the rule disallows the use of computerized record keeping and that the use of electronic record keeping should be allowed with back-up proof of competency, such as copies of written tests.

Response: DFPS is adopting this section without change. The requirements for training in this rule are taken from the current minimum standards. It is not an option for Licensing to provide a list of recognized training programs at this time. Also, the operation can scan an appropriate document if electronic record keeping is preferred.

§748.941. What are the instructor requirements for providing annual training?

§748.945. For caregivers that administer psychotropic medications, what annual training is required?

Comment: DFPS received three comments on these rules. One commenter did not feel this training was appropriate for houseparents who have on-going communication with the doctor. The other two comments agreed with the rule but felt the fiscal impact was underestimated.

Response: The information received from a doctor and information received through appropriate psychotropic medication training is significantly different. Regarding the fiscal impact, the estimated fiscal impact of $0.03 for every hundred dollars in sales per facility is not an underestimation of the costs. Section 748.945 requires caregivers that administer psychotropic medications to have training on additional curriculum components, and §748.941 requires the training to be delivered by a health care professional or pharmacist. The fiscal impact analysis that was done combined the rules. The survey that was sent out to the operations indicated that 87% of the responders to the survey already comply with these two rules (including operations that contract with Child Protective Services), and the rules didn't apply to another 2%. For the 11% that don't already comply with these new minimum standards, compliance should not be difficult. In some instances, operations may be able to add the additional components of the training to the training that is already being provided, especially since a specific number of hours for the training are not specified. Operations may also have health care professionals that can provide this training in-house. In any event, the estimated fiscal impact should adequately cover the costs that may arise. The fiscal impact used a minimum of two hours to estimate the costs for those 11% that are not currently requiring this training, and an hourly rate of $20 was used to calculate the cost of providing an appropriate trainer. Both estimations should be more than adequate to cover these additional costs. DFPS is adopting this section without change. Note: The other instructor requirements in §748.941 are required by current minimum standards, so do not have a fiscal impact.

§748.943. What areas or topics are appropriate for annual training?

Comment: One commenter recommended keeping the items related to child safety and removing program-related items in paragraphs (1), (3), (4), and (5).

Response: This list has already been revised significantly based on previous provider input. DFPS is adopting this section without change.

§748.985. Who can provide first-aid and CPR certification?

Comment: One commenter asked for clarification that the re-certification can be done through watching a video.

Response: Use of a video is only acceptable if an appropriate instructor is present to answer questions. DFPS is adopting this section without change.

§748.1001. What is the child/caregiver ratio?

Comment: One commenter complimented the entire subchapter regarding Child/Caregiver Ratios.

Response: DFPS is adopting this section without change.

§748.1003. For purposes of the child/caregiver ratio, how many children can a single caregiver care for during the children's waking hours?

Comment: DFPS received 12 comments. Six commenters expressed concern regarding the fiscal impact of lower child/caregiver ratios, with two of these suggesting that ratios should leave flexibility for operations to staff according to acuity. Six commenters expressed concern that this rule does not match the requirements in Chapter 749.

Response: DFPS is adopting this section without change. The number of adults available to supervise and interact with children is the most significant factor in reducing risk in child-care and providing children the care and attention they need. This rule only lowers the ratio for children under the age of five and for children receiving treatment services, both populations that require increased supervision and attention. These ratios are consistent with several other states and match or fall below the recommendations of the Child Welfare League of America. The survey that DFPS conducted indicated that 69% of operations are currently in compliance with this rule. DFPS feels the benefit of stronger ratios outweighs the fiscal impact.

§748.1005. Can child/caregiver ratios be averaged on an operation-wide basis?

Comment: DFPS received three comments. Two commenters stated that the rule is too restrictive and that operations should be allowed to fluctuate ratios as long as the ratios are maintained campus-wide and caregivers are readily available as needed. One commenter expressed general disagreement with the rule.

Response: DFPS is adopting this section without change. DFPS believes that caregivers should be present with children in order to be counted in the caregiver ratio. While a person who is doing paperwork in an office may be able to respond in an emergency, he or she is not interacting with or attending to the children nor able to manage the group or act in any preventative manner.

§748.1007. For purposes of the child/caregiver ratio, how many children can a single caregiver care for during the children's sleeping hours?

Comment: DFPS received five comments. Three commenters expressed concern regarding the fiscal impact of lower child/caregiver ratios. One commenter stated that the ratios in this rule "would not support a team approach." One commenter

suggested that emergency care service programs be required to have awake night staff.

Response: DFPS is adopting this section without change. The number of adults available to supervise and interact with children is the most significant factor in reducing risk in child-care and providing children the care and attention they need. This rule only lowers the ratio for children under the age of five and for children receiving treatment services, both populations that require increased supervision and attention at night. These ratios are consistent with several other states and match or fall below the recommendations of the Child Welfare League of America. DFPS believes the benefit of stronger ratios outweighs the fiscal impact.

§748.1009. How many caregivers must I employ?

Comment: One commenter expressed concern that subsection (b)(1) of this rule "puts an extreme financial burden on providers."

Response: DFPS is adopting this rule without change. DFPS disagrees that this rule creates a fiscal impact. This rule is consistent with current minimum standards and only clarifies what operations should currently be doing to provide appropriate supervision of children. This rule requires an adequate number of caregivers to supervise children and to meet their needs 24 hours per day and to provide back-up staff in the event of emergencies. Providers will document their ability to meet this rule through the operation's staffing plan.

§748.1013. How does a caregiver care for a child needing constant supervision during sleeping hours?

Comment: One commenter requested clarification of the phrase "comfortable sleeping quarters."

Response: The rule requires "comfortable sleeping arrangements" for a child who is moved near a caregiver during sleeping hours for purposes of direct supervision. DFPS believes this phrase is self-explanatory, and is adopting the section without change.

§748.1015. How does the child/caregiver ratio apply if I provide care for both children in care and children of caregivers, or for both children and adult residents?

Comment: DFPS received four comments, all expressing concern about subsection (a) of the rule, which requires children of caregivers to be counted in the child/caregiver ratio.

Response: The children of the caregiver need attention and supervision and therefore impact the caregiver's ability to provide care to the children residing at the operation. DFPS is adopting this section without change.

§748.1101. What rights does a child in care have?

Comment: DFPS received 15 comments. One commenter stated support of this rule and acknowledged the department's efforts. One commenter stated that this rule creates obstacles to providing care in a home-like setting and increase costs without expected gain in child well-being. Another commenter stated that the list of child rights is too specific and is mainly intended for children with disabilities or mental health needs. Five commenters suggested or requested language changes to certain sections of the rule for purposes of clarification. One commenter was pleased to see the language subsection (b)(5) relating to corporal punishment, while another commenter said this should be deleted because this discipline tool is effective for some children. One commenter was pleased to see the language in subsection (b)(20) relating to a child's right to have services in a language that he can understand. Another commenter stated that if the operation must hire an interpreter, this would be a significant financial burden and wanted clarification as to what "other means" might include. Another commenter stated that this requirement would have a fiscal impact "without appreciable gains in safety and wellbeing." Six commenters suggested deleting the right of a child to be free of discrimination based on "sexual orientation" in subsection (b)(2), stating that faith-based programs would not accept care of children with sexual orientation issues. One commenter also stated that right of a child to be free of discrimination based on gender could force gender-specific facilities to admit both genders. One commenter stated that a child's rights to have his physical, emotional, developmental, educational, social, and religious needs met as provided in subsection (b)(3) is open to interpretation and should be deleted. One commenter stated that the determination of "unnecessary or excessive" medication as provided in subsection (b)(23) should be a decision made by a physician and suggested adding the language "as determined by an independent physician."

Response: With the exception of the right to be able to communicate in a language that is understandable to the child, there is no fiscal impact to this requirement. Many of these rights are in current rule or were added to provide clarification. Staff believe all children in care deserve the rights enumerated in this rule and that acknowledging a child's rights does contribute to a child's overall well-being. Regarding the issue of being able to communicate, DFPS did a survey that indicated 89% of the operations already comply with this rule. Only 11% of the operations would be impacted at an estimated average cost of $0.36 per $100 of revenue. In addition, operations have the choice of not accepting a child into care if they can't communicate with him. DFPS believes that the benefit of having children placed with caregivers that they can understand outweighs the fiscal impact. DFPS is clarifying that not discriminating based on gender only applies to those operations that accept both genders and adding a right not to be required to make public statements acknowledging his gratitude to the operation.

§748.1103. How must I inform a child and the child's parents of their rights?

Comment: DFPS received eight comments. One commenter stated that children may be accepted for admission some time before they are actually admitted. The commenter suggested changing "accepted" to "admitted." One commenter stated that the number of issues to be addressed and the technical terms used in subsections (a) and (b) make it impossible to explain the child's rights in "simple, non-technical terms". It was recommended that the rule be deleted or abbreviate the requirements to make it compatible with the stated intent. Six commenters stated that subsection (e) should be deleted since this is not required of child-placing agency homes.

Response: DFPS is revising this rule based on the comments by allowing a longer time frame (seven days instead of 24 hours) after admittance to explain a child's rights, changing "accepted" to "admitted", and deleting subsection (e). DFPS can also provide operations technical assistance to provide client rights in simple, more technical terms or refer them to agencies that may be of assistance.

§748.1105. What provisions must I make for a child's personal care?

Comment: One commenter suggested amending paragraph (1) to include the language "within the policies of the facility."

Response: DFPS is revising paragraph (1) based on the comment.

§748.1107. What right does a child have regarding contact with his parent(s)?

Comment: DFPS received five comments regarding §748.1107. One commenter stated that requiring so much to be in the service plan makes it unwieldy and less effective, and suggested requiring that visit/contact planning be documented, but not in the service plan. One commenter stated that this section is prescriptive and demanding on the facility. This commenter and another wanted the rule revised to give a facility more latitude in making decisions to limit family contact. The same commenters wanted subsection (d) deleted, stating that having a professional level service provider re-evaluate contact restrictions monthly is arduous. One commenter stated that facilities often have no control over whether or not a child has contact with family members, as this is determined by the CPS caseworker. One commenter suggested adding a rule prohibiting facility staff from supervising or monitoring communications between a child and his attorney or attorney ad litem, since these are confidential attorney-client communications.

Response: DFPS is adopting the section with changes. While family contact is important, staff agrees that the requirement regarding visit/contact planning should not be in the service plan and revised this section to require documentation of any plans for child/parent contact to be in the child's record. Subsection (d) is changed to clarify that subsections (c) and (d) relate only to restrictions imposed by the operation.

§748.1109. What right does a child have regarding contact with siblings?

Comment: One commenter recommended that a statement be added to subsection (a) that a child must have a reasonable opportunity for sibling visits and contacts "unless having contact with a sibling is not in the child's best interest."

Response: DFPS is not revising the rule as a result of the comment since subsection (c) addresses the issue. However, subsection (b) is revised to include documentation of plans for sibling visits and contacts in the child's record instead of the child's service plan. If restrictions between a child and his siblings lasts more than 90 days, justification must be documented for continuing the restriction. Current rule requires documentation every 30 days.

§748.1111. What right to privacy does a child have in his contact with others?

Comment: DFPS received two comments. One commenter wanted clarification to know if "monitor" means listening to the child's calls or screen calls. One commenter stated that this section is too restrictive for caregivers of young children with basic needs. The commenter suggested moving this section to treatment only regulations.

Response: DFPS is revising the rule as a result of comment. Subsections (a) and (b) are revised so that young children can have assistance with reading/writing mail or using the telephone. And monitoring calls has been clarified to mean listening to or screening calls.

§748.1113. Under what circumstances may I conduct a search for prohibited items or items that endanger a child's safety?

Comment: DFPS received three comments. One commenter stated that this section is too restrictive for caregivers of young children with basic needs and suggested moving this section to treatment only regulations. One commenter stated either delete or clarify the meaning of "contraband", while two other commenters recommended deleting this rule as it shifts the responsibility from the child, to the caregiver who is responsible for enforcing the policies and procedures.

Response: The section is revised to clarify that reasonable searches are allowed for a "prohibited item or an item that endangers the child's safety."

§748.1117. What must I document regarding a search?

Comment: One commenter recommended moving these regulations to treatment only regulations and stated that it is a HIPAA violation to mention other children's names in a client's record. Keep proposed requirements as written for personal searches, but clarify what is meant by "resolution of the issue." For environmental searches, require that the client or a witness be present for the search, with a progress note stating that the search occurred and what the results were.

Response: DFPS is adding a cross-reference to §748.1113, which is changed to clarify that the rule applies to searches for a "prohibited item or an item that endangers the child's safety." DFPS believes that documentation in these situations is reasonable and necessary. DFPS is adopting this rule with changes based on the remaining comments. The requirement to document names of other children involved in the search is deleted. "Resolution of the issue" is clarified by adding examples of "increased supervision, additional therapy, or disciplinary consequences."

§748.1201. May children receiving different types of service live in the same living quarters?

Comment: One commenter stated that subsection (b) appears to contradict §748.4261 relating to respite services, and should include an exemption for operations that are licensed to provide emergency care services.

Response: DFPS agrees, and is adopting the section with changes based on the comment.

§748.1203. What children may I admit?

Comment: DFPS received three comments. One commenter stated that subsection (a)(3) is a barrier to keeping children close to home, in a family setting, with siblings. One commenter stated that the subsection regarding emergency care services contradicts what is commonly practiced. CPS caseworkers very regularly move children into new placements to emergency care solely because the children have exhausted their current placement. One commenter stated that the subsection regarding the admission of a child whose behavior and/or history indicates an immediate danger to himself or others needed clarification.

Response: The paragraph regarding emergency care services was deleted. The relevant language from that paragraph, which comes from the Texas Family Code, §32.201, was moved to the definition of emergency care services at §748.61(3)(A). The paragraph regarding a child that is an immediate threat to himself or others was deleted because the information is already included in §748.1219. However, in that section a two-month time frame is added to clarify the period of time when a child's history may indicate he is in immediate danger to himself or others.

§748.1205. What must I document in the child's record at admission?

Comment: DFPS received two comments. One commenter suggested deleting the requirement to document the time of admission in subsection (a)(4) since it does not serve a purpose. Another commenter questioned if subsection (a)(8) would necessarily apply to a child in a operation providing basic child care services Response: DFPS agrees with the recommendation, and is deleting the requirement to document the time of the child's admission. A clarification is made to include information for any person with whom the child is allowed to leave the operation. DFPS is adding information to include the names, addresses, and telephone numbers of biological or adoptive parents, the names, addresses, and telephone numbers of siblings, and any chronic health conditions. In response to the comment at §748.1537, DFPS is adding a requirement to include known contraindications to the use of a restraint.

§748.1209. What orientation must I provide a child?

Comment: DFPS received three comments. Two commenters suggested that the time frame be more flexible to allow children to settle into the program before being overwhelmed with information. One commenter commended DFPS for including in the child's orientation information on emergency behavior intervention.

Response: DFPS agrees, and revised subsection (a) to allow a more flexible timeframe of seven days from the date of the child's admission for providing the child with an orientation instead of at the time of admission.

§748.1211. What information must I share with the parent at the time of placement?

Comment: One commenter wanted to know if the subsection regarding the parent's right to withdraw consent for services means individual services within an operation or withdrawal from the operation itself.

Response: DFPS is adopting the section with changes to clarify in which situations a parent may withdraw consent.

§748.1215. When must I complete the admission assessment?

Comment: DFPS received 13 comments. One commenter wanted clarification on the types of operations that must conduct an admission assessment. The other 12 commenters were all concerned that assessments required by this rule would be time consuming, unnecessary, and unreasonable.

Response: All operations are expected to conduct admission assessments of a child admitted into the operation. DFPS clarified this rule by referencing §748.1217. For the changes made to that rule, see the response below. The assessment required for a child whose treatment needs changes is moved to §748.1201.

§748.1217. What information must an admission assessment include?

Comment: DFPS received five comments. Two commenters stated that the new admission assessment requirements are excessive. One of the commenters suggested maintaining current admission assessment and service plan requirements for children receiving basic care while the other commenter suggested regrouping specific items into general categories, as Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards do to allow for more flexibility. Another commenter suggested including known medical conditions that would be contraindications to the use of restraint in subsection (a)(8). Another commenter stated that it is difficult to get historical information and could require many man-hours to track down the information. The commenter suggested that information available through the managing conservator be identified as acceptable with no further effort to acquire information required. Another commenter stated that subsection (b) will be a great benefit to operations in providing continuity of care. However, a request in writing from another operation without a signed authorization from the managing conservator could not be honored.

Response: DFPS is revising the rule to divide the admission assessment requirements into two new subsections, (b) for requirements to be completed prior to a child's non-emergency admission that address the child's immediate needs and current level of functioning, and (c) for information to be added to the child's admission assessment prior to completing the child's initial service plan that address the child's long-term needs and historical information. Also, the last subsection of the rule is revised based on the concern expressed by the second commenter to reflect that the operation must make an effort to obtain the managing conservator's authorization to request written information from other operations before making such requests.

§748.1219. What are the additional admission requirements when I admit a child for treatment services?

Comment: One commenter stated that it is difficult to get historical information and could require many man-hours to track down the information. The commenter suggested that information available through the managing conservator be identified as acceptable with no further effort to acquire information required.

Response: DFPS is not revising the rule as a result of the comment. This rule is taken from current minimum standards. Also, §748.1221 instructs operations as to what is required if information cannot be obtained by the operation. Minor editorial changes are made to the rule.

§748.1225. What are the dental requirements when I admit a child into care?

Comment: One commenter asked who is responsible to pay for a child's dental care if the child does not have Medicaid coverage.

Response: Responsibility for payment is between the operation and their client. DFPS is adopting this section without change.

§748.1227. What must I document when I re-admit a child for care?

Comment: One commenter suggested changing the re-admission documentation requirements to require the operation to complete all required documentation and to note which information is updated information versus new information.

Response: DFPS believes the language suggested by the commenter is less clear than the proposed language, and is adopting the section without change.

§748.1261. For which of my programs may I accept emergency admissions?

Comment: One commenter recommended allowing emergency admissions to transitional living programs and therapeutic camp programs if the programs are geared to handle them so as not to limit placement options for children. The commenter suggested that a transitional living program accept a child for an emergency placement if sufficient information is available to determine a child's safety needs.

Response: Admission of a child into a transitional living program requires knowledge of the child's ability to function more independently and with less staff supervision, so an emergency admission is not appropriate. However, emergency admissions do not preclude a child from obtaining transitional living skills training. Current minimum standards do not allow emergency admissions into therapeutic camps, which is appropriate due to the demands of the therapeutic camp setting. DFPS is adopting this section without change.

§748.1263. What constitutes an emergency admission to my operation?

Comment: DFPS received two comments, both stating that the criteria that constitutes an emergency admission are too limiting and leave no room for an operation to assess the family situation of applicants on a case-by-case basis. One commenter suggested allowing operations to define emergency admissions in their policies.

Response: DFPS is adopting the section with a change, broadening the list of criteria constituting an emergency admission by adding a new paragraph to include a child without adult care.

§748.1265. May I take possession of a child through a law enforcement or juvenile probation officer?

Comment: DFPS received two comments, both suggesting that this rule be changed to address a planned admission of a child.

Response: By definition, this is an emergency admission, so a planned admission is not possible. DFPS is clarifying this rule by cross-referencing it to the requirements of Division 7, Subchapter H of Chapter 745 (relating to Taking Possession of a Child Through Law Enforcement or a Juvenile Probation Officer).

§748.1301. What responsibilities do I have for the education of a child in care?

Comment: DFPS received two comments. One commenter stated that the regulations as drafted attempt to blend guidance on the responsibilities for the education of children with and without disabilities. Because the terminology, as well as the requirements, are different for the two populations, the commenter suggested (1) separating rules for children with disabilities who receive special education from more general requirements that apply to all children in school; (2) directly referencing rules governing the education of students with disabilities in the "MOU Concerning Interagency Coordination of Special Education to Students with Disabilities in Residential Facilities"; and (3) ensuring that eligible students have an appointed surrogate parent who has been trained to represent the student's best interests. The same commenter stated that a school can be accredited and still not have the appropriate resources and/or staff to appropriately serve all students with disabilities. Another commenter stated that not all children in care are children from Texas or children in CPS care. The commenter suggested revising subsection (a)(2) by including other nationally recognized educational accrediting agencies or out of state school district funding the child.

Response: DFPS agrees with the comments and is clarifying the education responsibilities for all school-age children and those responsibilities for children with special needs. It is also clarified that an educational program can be approved or accredited by the Southern Association of Colleges and Schools or the out-of-state school district funding the child in care.

§748.1303. What responsibilities do I have for a child's individual educational needs?

Comment: One commenter recommended that paragraph (5) cite relevant laws and regulations governing the use of physical restraint and time-out with students with disabilities attending public schools. The same commenter also recommended eliminating the words "ITP meeting" from paragraphs (6) and (7) since the law no longer requires a separate transition plan or meeting, and deleting the acronym IEP since ARD and IEP are the same thing. ARD is the term used in Texas for the IEP meeting. In addition, it was recommended that the word "related" be added to paragraph (7).

Response: Citing the relevant emergency behavior intervention laws in this rule would not be appropriate. DFPS is revising paragraphs (6) and (7) by eliminating the words "ITP meeting" and "IEP"; and adding the word "related" to paragraph (7).

§748.1305. If I have an educational program, what information must I provide to a child's parent about that program?

Comment: DFPS received two comments. One commenter suggested revising the language in paragraph (3) to require that families be notified whether or not TEA has approved the school, if applicable to that particular child. Another commenter suggested deleting the reference to the Texas Education Agency in paragraph (5) and replacing it with the State Board for Educator Certification (SBEC), which regulates teachers. The same commenter suggested adding to the information that must be provided to a child's parent, the right of the child to services "in the least restrictive environment," including the local public school, even if the facility has a charter school.

Response: DFPS believes the language of this rule is sufficiently clear, with one exception. DFPS is revising paragraph (5) to delete the reference to the Texas Education Agency and replace it with the State Board for Educator Certification.

§748.1331. What are the requirements for a preliminary service plan?

Comment: DFPS received 12 comments. One commenter suggested deleting this rule since the requirements of the "preliminary service plan" are addressed in child-care policy and procedure. One commenter wanted clarification regarding the type of operations that must conduct a preliminary service plan. One commenter stated that the proposed change creates obstacles to providing care in a home-like setting and increases costs without expected gain in child well-being. Six commenters suggested excluding the requirement for a preliminary service plan in subsection (a) for children receiving child-care services. Treatment service providers might need this information; however, it will not provide a productive service for children coming into "basic care". The admission assessment will provide the information needed to care for the children until the initial service plan. One commenter recommended including the requirement to document possible side effects of medications required in subsection (b)(2) in an admission assessment, as such information would need to be known sooner than within 72 hours.

Response: This rule applies to all general residential operations and residential treatment centers. DFPS believes it is reasonable and important to require a preliminary service plan within 72 hours to provide guidance to caregivers in addressing the immediate needs of a child. Clarification language has been added to further describe the immediate needs of a child "such as enrolling a child in school or obtaining needed medical care or clothing."

This is also important because the new Chapter 748 rules have extended the time frame for the completion of a child's initial service plan from 30 days to 40 days.

§748.1337. What must a child's initial service plan include?

Comment: DFPS received five comments. The commenters stated that the service planning rules were either too prescriptive, complex, or overwhelming. One commenter suggested maintaining the current service plan requirements for children receiving basic care and another believes the current standards are adequate for children receiving basic care. Two commenters suggested reducing and simplifying the requirements. One of these commenters suggested regrouping specific items into general categories, as JCAHO standards do, which allows more flexibility to better serve children's individual needs.

Response: DFPS believes that these requirements are reasonable and necessary for a child's initial service plan. A few clarifications were made as a result of the comments, for example the deletion of "a scheduled date for review and development" for delays in addressing a child's needs. DFPS made some additional editorial changes.

§748.1341. When must I inform the child's parent(s) of an initial service plan meeting?

Comment: DFPS received three comments. One commenter stated that a meeting for an initial serve plan is currently not required and suggested deleting this requirement. One commenter suggested deleting subsection (a) or change the requirement for one week advance notice of the initial service plan meeting stating it doesn't match up to practice. One commenter requested clarification of the word "summary" and suggested allowing for documentation of verbal notification of parent of an initial service plan meeting.

Response: DFPS is revising the subsection to allow the verbal notification of a parent regarding an initial service plan meeting. In response to the other comments, a meeting to review the child's history, any evaluations of the child, the needs of the child, and how those needs should be prioritized is important in the development of the child's initial service plan. The requirement that the child's parent receive at least two weeks advance notice of the plan of service review is in current minimum standard rule, so the notification time frame for the initial service plan should be consistent with that.

§748.1381. How often must I review and update a service plan?

Comment: One commenter suggested reviewing and possibly updating service plans as part of the debriefing process after each use of restraint or seclusion.

Response: Reviewing and updating service plans as part of the debriefing process after each use of restraint or seclusion would be labor intensive and a have a negative fiscal impact. DFPS is not revising the rule as a result of the comment, but is making minor editorial changes.

§748.1383. How does a child's transfer affect the timing of the review of a child's service plan?

Comment: One commenter stated that subsection (a) is unnecessary and redundant, as reasons for the transfer of a child would have been addressed in the child's most recent service plan review.

Response: DFPS is not revising the rule as a result of the comment, but is making minor editorial changes. Reasons for the transfer of a child would not necessarily have been addressed in the child's most recent service plan review, particularly depending upon how recently the last service plan was completed.

§748.1385. How do I review and update a service plan?

Comment: DFPS received three comments. One commenter supports this section which reinforces DFPS's expectation of providers that they will frequently re-evaluate the use of emergency behavior interventions and develop strategies for each child to reduce the need overall. Another commenter suggested that the list of requirements for reviewing the initial service plan requirements be prioritized and simplified as it is long, complex, and may be more pertinent to children being maintained at higher levels of care. In addition, some of the documentation requirements are redundant, burdensome, and with no value added. Another commenter stated that requirements for basic level services are increased and more treatment oriented. It was suggested that there be more distinction between basic and treatment plans.

Response: The service planning team may prioritize the child's service planning goals and objectives based on the child's admission assessment as provided in §748.1337(a), even though service plan components not initially addressed must have a justification for the delay in addressing the needs. The distinction between children receiving child-care services treatment services is how often a case has to be reviewed. For child-care services it is every 180 days, and 90 days for treatment services. DFPS is not making changes to this rule based on the comments. DFPS is making editorial changes to the rule and reminding operations that medical interventions must also be evaluated in relation to meeting a child's identified needs.

§748.1389. How often must I re-evaluate the intellectual functioning of a child receiving treatment services for mental retardation?

Comment: One commenter stated that the Texas Special Education laws and TEA require testing every three years for students with developmental problems, LD, etc. The commenter recommended that a child's intellectual functioning be tested every three years for children in care.

Response: DFPS is revising the rule as a result of the comment.

§748.1431. What does a "transfer" of a child in care mean?

Comment: One commenter requested waiving some of the documentation for admissions/ discharges when a child is moving between two operations located on the same property and owned by the same organization.

Response: DFPS is revising the definition of "transfer" as a result of the comment.

§748.1433. Who must plan a child's non-emergency discharge or transfer?

Comment: DFPS received five comments. Three commenters expressed concern about the subsections requiring children to receive advance notice of a discharge/transfer, unless an appropriate professional documents justification for not giving the notification. One commenter wanted clarification of what "if agreeable" means in subsection (a)(4). Another commenter stated that the discharge documentation will be significantly increased and seems to be more geared toward children with treatment needs. The commenter suggested deleting these requirements for children receiving basic care.

Response: Based on the comment DFPS is adding a "professional level service provider" to the list of professionals that can justify not providing advance notice of a discharge/transfer of a child not receiving treatment services. Other editorial changes were also made, including the deletion of the "if agreeable" language.

§748.1437. What must I document in the child's record regarding a planned discharge or transfer?

Comment: DFPS received two comments. One commenter stated that the discharge documentation will be significantly increased and seems to be more geared toward children with treatment needs. The commenter suggested deleting these requirements for children receiving basic care. Another commenter asked what role the managing conservator plays and suggested adding - parents, managing conservator, or law enforcement to those who may accompany the child.

Response: DFPS believes it is vitally important to have the discharge/transfer summary for a child and the receiving program. Most of these documentation requirements will not take much time to complete. The requirements that will take more time are vital for a quick overview of the child's case and for continuity of care. The last commenter is likely referring to §748.1435(f), in which parents and law enforcement are already included and managing conservator is included in the definition of parent. DFPS is adding the telephone number to be included for support services.

§748.1439. When I discharge a child to another operation or child-placing agency, what information must I provide them?

Comment: One commenter stated that this rule seems to both duplicate and hold inconsistencies with §748.1437. The commenter suggested incorporating §748.1437 and §748.1439 into one rule.

Response: DFPS is adopting this section and §748.1437 with changes based on the comments.

§748.1443. What constitutes an emergency discharge or transfer?

Comment: DFPS received four comments. The commenters stated that private operations should be able to determine what constitutes an emergency discharge. It was suggested to eliminate "10 days notice" from the definition of emergency discharge. One of the commenters also stated that paragraph (4) is unclear and questioned whether it should say "if" the child remains rather than "and" the child remains in your care.

Response: DFPS is revising the rule as a result of the comments.

§748.1501. What general dental requirements must my operation meet?

§748.1503. Who must determine the need and frequency of ongoing maintenance of dental health for a child?

Comment: One commenter was concerned that meeting these rules might be difficult since dental Medicaid providers are hard to find in some areas of the state.

Response: All children deserve to have dental care. DFPS is not revising the rules as a result of the comments. One typographical error is corrected in §748.1501.

§748.1531. What general medical requirements must my operation meet?

Comment: One commenter recommended that a medical evaluation be required on any child who has been restrained as part of an emergency behavior intervention.

Response: DFPS is adopting this section without change. The recommendation would create a negative fiscal impact for operations, and cannot be considered at this time.

§748.1535. Who must perform medical examinations and provide medical treatment for a child?

Comment: One commenter stated that license "to practice medicine" limits this rule to medical doctors and doctors of osteopathy. This does not seem to be what is intended.

Response: DFPS agrees, and is adopting the rule with changes based on the comment.

§748.1537. What information must I provide caregivers about a child's medical needs?

Comment: One commenter recommended that the following be added to the rule of things that caregivers must be informed of, "including any contraindications to the use of restraint."

Response: DFPS agrees with the comment, but does not believe it belongs in this section. DFPS is adding the following language to §748.1205 (relating to What must I document in the child's record at admission?) and §748.1271 (relating to At the time of an emergency admission, what information must I document in the child's record at admission?): "known contraindications to the use of restraint." DFPS is also deleting this rule because it is already covered in the admission requirements.

§748.1543. What documentation is acceptable for an immunization record?

Comment: DFPS received two comments. One commenter stated that professionals or licensed nurses should able to document the current immunization records based on a telephone conversation with another health care professional at a school or a physician's office. The commenter recommended this be added to this rule along with the requirements for them to document the information of the telephone conversation. One commenter stated that caregivers should be able to document telephone conversations with the health-care professionals regarding current immunization records.

Response: DFPS is adopting the section with changes based on the comments.

§748.1547. What must I do if a child in my care is identified as needing a diagnostic vision or hearing examination?

Comment: One commenter asked who would pay for the vision and hearing examinations if the child does not have Medicaid coverage or other funding and there is no funding,

Response: Responsibility for payment is between the operation and their client. DFPS is adopting this section without change.

§748.1583. Who must have a tuberculosis (TB) examination?

Comment: DFPS received four comments. Licensing met with the Department of State Health Services (DSHS) regarding tuberculosis screening and received both verbal and written comments. DSHS recommended that tuberculosis screenings be conducted when a child first enters into or an employee first begins working at a residential childcare operation. DSHS also stated that further testing is not needed unless there has been a gap in services or employment for the child or worker of more than 12 months.

Response: DFPS is adopting this section with changes based on DSHS' comments.

§748.1615. May I use protective devices?

§748.1633. May I use supportive devices?

Comment: One commenter recommended that a physical therapist or occupational therapist be required to be part of the treatment team involving the initial and continued use of protective and supportive devices.

Response: The recommendation would create a negative fiscal impact for operations and cannot be considered at this time. However, DFPS is making editorial changes to clarify that the service planning team's justification must be documented in the child's service plan and must include "ways to reduce the need for" such devices. In addition, DFPS is deleting the paragraph regarding bed rails, and clarifying in §748.1611 that bedrails may be a protective device.

§748.1661. What policies must I enforce regarding tobacco products?

Comment: One commenter said that they do not want children exposed to second hand smoke, but this can be done short of telling parents they cannot smoke in their own homes (for cottage parents that live at the facility).

Response: DFPS is adopting this section with change based on the comment. The words "use tobacco products" are changed to "smoke tobacco products"; and subsection (b) is revised to allow an adult to smoke tobacco products in their homes when children are not present.

§748.1707. What are the requirements for tube-feeding formula?

Comment: One commenter said that tube-feeding requirements should be based on manufacturer's instructions or doctor's orders.

Response: DFPS is adopting this section with changes based on the comment.

§748.1743. What are the basic care requirements for an infant?

Comment: One commenter stated that the other regulations that requires mature, trained and supervised caregivers will insure that infants needs are met, therefore delete subsections (a), (b) and (c). The commenter also asked that subsection (e) be modified, because the rule that says a caregiver must supervise infants at all times takes care of this.

Response: DFPS believes the specificity for infant care is needed. However, DFPS is revising subsection (e) based on the comment by adding clarification that a sleeping infant is considered supervised if the caregiver is within eyesight or hearing range of the child and can intervene as needed.

§748.1745. What steps must a caregiver follow when changing a child's diaper?

§748.1747. What must I do to prevent the spread of germs when diapering children?

§748.1749. What furnishings and equipment must I have in my infant care area?

Comment: One commenter asked that these rules be deleted since the health concerns in residential care is different from those of day care centers that have an influx of children from the public. The commenter also stated that these are not necessary and are too specific requirements, since there has been no outbreaks of disease in residential or foster care to warrant these rules.

Response: DFPS believes that these requirements are reasonable and important in ensuring the health of children in care, and is adopting the sections without change.

§748.1751. What specific safety requirements must my cribs meet?

Comment: One commenter asked that subsection (b) be deleted and stated that it contradicts an earlier regulation that requires each child to have his own crib.

Response: DFPS is revising subsection (b) based on the comment. It now states: You must sanitize each crib when soiled and before reassigning the crib to a different child.

§748.1753. Are mesh cribs or port-a-cribs allowed?

Comment: One commenter stated that although these requirements are good ideas, many are hard to monitor in 24-hour care except by observing the supervision of the home the cleanliness and the environment etc. The commenter was disturbed by the inclusion of product safety regulations that are subject to rapid change.

Response: DFPS is deleting some of the crib requirements based on the comment, and adding subsection (b), which states "If you become aware of a recall for the port-a-crib used, you must discontinue its use."

§748.1757. What types of equipment are not allowed for use with infants?

Comment: One commenter requested that this section be replaced with the requirement that cribs, portable cribs, and other infant's furniture and equipment must be used according to manufacturer's instructions. If a caregiver knows of a recall of infant equipment, they must discontinue its use.

Response: This comment is clarified in §748.1753. DFPS is adopting this section with changes by clarifying that beanbags, waterbeds, or foam pads may be used, but children may not sleep on them.

§748.1759. What activities must I provide for infants?

§748.1763. Are infants required to sleep on their backs?

§748.1791. What are the basic care requirements for a toddler?

Comment: One commenter had the same comment for all three sections. The commenter stated that drug exposed and infants born addicted to drugs sometimes have different needs and recommended experienced and trained caregivers know these things and need to be able to apply the care the child the child needs without the safety parameters.

Response: DFPS believes that the proposed requirements in §748.1759 are reasonable, and is adopting the section without change. DFPS is revising §748.1763 based on the comment to allow flexibility for an infant to be placed in a face-up sleeping position if a health-care professional orders it. DFPS believes that the proposed requirements in §748.1791 are reasonable, but is adopting with a change to be consistent with the clause made in §748.1743(e).

§748.1821. What information must I provide a pregnant child regarding her pregnancy?

Comment: DFPS received three comments. One commenter requested that paragraph (3) be replaced with the following: "Provide counseling and encouragement in personal decision making while informing the child of her right to be free from pressure to make a particular decision about her pregnancy." One commenter asked that paragraph (3) be deleted and stated that it is necessary to insure that licensed facilities do not pressure pregnant children about abortion, adoption etc. However, faith based organizations should have more latitude than this regulation allows in how they discuss pregnancy related issues. One commenter stated that when children are received through emergency care providers, it may be really late in the pregnancy and the provider must focus on immediate needs regarding the upcoming labor and delivery. This rule should say that nutrition and other prenatal guidance must be appropriately provided within the first or second trimester of the pregnancy, or as early as possible upon learning of the pregnancy.

Response: Based on the comments, DFPS is deleting the requirement to document the counseling that is provided.

§748.1823. Is the use of emergency behavior intervention of a pregnant child permitted in my operation?

Comment: One commenter commended DFPS for specifically addressing these critical issues of restraints used on pregnant children.

Response: DFPS is adopting the section without change.

§748.1943. Must adult residents have a tuberculosis (TB) examination?

Comment: Comments were received from the Department of State Health Services (DSHS) regarding tuberculosis screening requirements.

Response: DFPS is adopting this section with a change to cross-reference applicable requirements listed in §748.1583, which is significantly revised according to DSHS recommendations.

§748.1945. What must I do if an adult resident has a positive tuberculosis test result?

Comment: DSHS stated that when a facility has knowledge of a suspected case of tuberculosis disease or contacts to a known case of tuberculosis or other persons identified with latent TB infection, the Department of State Health Services rules regarding communicable diseases contain reporting requirements, which are applicable to all persons in Texas, including those operating these facilities. Therefore, any DFPS rule on this subject should reference those specific subchapter requirements.

Response: DFPS is adopting this section with a change to cross reference applicable requirements that have been added to §748.1581.

§748.2001. What consent must I obtain to administer medications?

Comment: DFPS received three comments. One commenter asked that this rule be deleted. One commenter asked that this be limited to psychotropic, non-emergency medications. The commenter also stated that this requires a specific consent to each medication prescribed, not just psychotropic medications. All other regulatory agencies allow for a general consent for routine medications. One commenter stated that informed consent requirements were intended by the legislature to apply to children in DFPS custody. Extending these standards to children not in DFPS custody should not be done without further public debate.

Response: DFPS is adopting this section with changes. Subsection (b) is revised to apply only to new psychotropic medications. Subsection (a) refers to a general consent that can be obtained at the time of admission.

§748.2003. What medication requirements must my operation meet?

Comment: DFPS received three comments. One commenter stated that this rule has the potential to conflict with areas outside licensing jurisdiction. Informed consent for psychotropic medications includes wording that holds caregivers responsible for doctors giving informed consent information. One commenter recommended that this rule be deleted and asked if this includes ALL medications, even OTCs and antibiotics. One commenter asked that the following be added to subsection (b)(7) "except when administering a emergency medication as defined in §748.2401 and other regulations governing emergency behavior intervention or as ordered by a court of law."

Response: Based on comments, this rule is revised to clarify which subsections apply only to prescription medication.

§748.2005. May I accept verbal orders on the administration of medication?

Comment: One commenter asked that this rule be deleted.

Response: Verbal orders are necessary in some instances. DFPS is adopting this section with editorial changes and a requirement that the verbal orders be documented in the child's record.

§748.2009. What are the requirements for administering non-prescription medication and vitamins?

Comment: One commenter asked who is required to approve the over-the-counter medications and asked that the rule be deleted.

Response: DFPS is adopting this section with a change. "Over-the-counter medications and non-prescription vitamins" have been renamed to "non-prescription medications and vitamins." An operation may provide non-prescription medications and vitamins according to the directions as long as they are not contraindicated with other prescribed medications or the child's medical conditions. The paragraph on documentation is deleted because it is addressed in §748.2151.

§748.2101. What medication storage requirements must my operation meet?

Comment: DFPS received two comments. One commenter recommended that the rule allow external medication to just be kept separate, not necessarily locked. One commenter asked that the requirement for storage in a double lock container be eliminated.

Response: DFPS believes a double lock for controlled substances is necessary. However, DFPS is adopting this section with a change to clarify that medications "for external use only" do not have to be locked separately from other medications. Clarifications are also made when destroying medications. It has to be done in a manner that ensures a child does not have access to the medication. Another clarification requires the medication to go with a child upon discharge or transfer.

§748.2103. What are the requirements for discontinued or expired medication?

Comment: One commenter recommended that the following be added to subsection (b) .in accordance with state and federal law; OR (c) When you have an accumulation of this medication, a registered pharmacist will take custody of the medication as allowed by state and federal law.

Response: DFPS is revising subsection (b) to provide another option as suggested by the commenter.

§748.2151. What records must I maintain for each child receiving medication?

Comment: DFPS received two comments. One commenter asked that this rule clarify that this is not required when medication is administer by an individual authorized to administer medication by the State of Texas. One commenter stated that a licensed RN that has foster care experience asked that subsection (d) be eliminated and modified to allow the medication error section to be less detailed for non-treatment services. The commenter also stated that these procedures are necessary when different shifts of staff give medications, not when a single caregiver or couple administers medication in a family setting.

Response: DFPS is adopting the rule with changes to subsections (a) and (c) based on the comments.

§748.2205. What must I do if I find a medication label error?

Comment: One commenter asked that paragraph (2) allow for the label to be corrected immediately or within 24 hours or next business day of notification of the pharmacy.

Response: Paragraph (2) is revised based on the comment.

§748.2253. If my operation employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give consent before requesting his consent for the child to be placed on psychotropic medication?

§748.2255. If my operation does not employ or contract with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give medical consent prior to the health-care professional prescribing psychotropic medications to a child in care?

§748.2257. What are the requirements if a physician orders administration of a psychotropic medication to a child in an emergency?

§748.2259. What information must I document about a child's use of psychotropic medication?

§748.2261. If my operation employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what are the requirements for evaluating whether a child should continue taking a psychotropic medication?

Comment: DFPS received ten comments regarding §748.2253 through §748.2261.

The commenters were concerned that these rules have the potential to conflict with areas outside licensing jurisdiction by holding caregivers responsible for doctors giving informed consent information. One commenter asked that the rule be deleted or allow a blanket permission to be given once at admission. One commenter stated that if this standard is adopted, it would have the effect of preventing children from receiving medication in a timely manner. The commenter proposed that this rule be amended to allow parents to be notified of changes in psychotropic medications at the child's next service plan. Six commenters asked that the rule be modified to say, "obtain the permission from the personal legally authorized when admitting the child. Notification will be made to the person legally authorized at the next plan of service." One commenter asked what if we don't know where the parents are and what about dosage changes. One commenter stated that informed consent requirements were intended by the legislature to apply to children in DFPS custody, not the general population of privately placed children.

Response: Psychotropic medications are particularly powerful and life-affecting. Children are better protected from unnecessary medications when their parents and/or managing conservators are provided with adequate information to inform their consent of those medications. DFPS staff believe that residential child-care operations should be responsible for working with parents and/or managing conservators before placing children on medications. There was some confusion over §748.2253 and §748.2255, and which rule applied to prescribing doctors not associated with the operation. In a situation where the operation does not employ or contract with a doctor that prescribes the psychotropic medication, then §748.2255 applies. DFPS did delete §748.2251 because it was confusing and was addressed in other rules. DFPS has also clarified two issues in §748.2001: a general consent may be obtained to administer routine, preventive, and emergency medications; and consent for psychotropic medications does not have to be obtained for dosage changes, only new medications. DFPS did make some editorial changes to §748.2559.

§748.2301. What are the requirements for disciplinary measures?

Comment: DFPS received two comments. The commenters did not feel that the rules reflected the positive aspects of discipline. One commenter stated subsection (c) should be re-worded to say that discipline must include elements of teaching child acceptable behavior.

Response: Subsection (c) is revised based on the comment.

§748.2307. What other methods of punishment are prohibited?

Comment: One commenter stated that a lot of the language in this rule is very subjective such as: shaming, yelling, using harsh language, etc.

Response: DFPS is revising paragraphs (5) and (9) to eliminate subjective language and adding "shaking" as inappropriate discipline.

§748.2309. To what extent may I restrict a child's activities as a behavior management tool?

Comment: DFPS received two comments. One commenter said that it would be difficult to get permission from a counselor, doctor or a CPS worker 24-7. One commenter stated that it should be clear that a child's access to his attorney ad litem, either in person, via telephone or through the mail must not be restricted or used in any manner as a behavior management tool.

Response: Based upon comments, DFPS is deleting the subsection regarding restrictions on communications with family. Subsection (b) is not revised as it only applies to restrictions longer than seven days, so this gives plenty of time for the caregiver to get permission for the length of the restriction. The room or building restrictions over 24 hours are more severe and warrant professional level approval. Access to an attorney ad

litem is a legal right, therefore, it is not necessary to include this in rule.

§748.2401. What do certain words mean in this subchapter?

Comment:

(1) One commenter wanted the definitions for seclusion and time out clarified so that time out is differentiated from seclusion. The commenter expressed concern that the definitions do not indicate if these acts are voluntary or not.

Response: DFPS is deleting the definitions for "time out" and "quiet time" because these terms are not used in this subchapter, and revising the definition for "seclusion" to comply with the definition in Senate Bill 325, 79th Legislative, Regular Session.

(2) One commenter had questions about short personal restraints.

Response: The rules in this subchapter further delineate the requirements for short personal restraints. DFPS is not revising this definition.

Also in §748.2401, DFPS is deleting the definition of quiet time.

§748.2453. Who may administer emergency behavior intervention?

Comment: One commenter suggested that all personal restraints, including short personal restraints, should only be performed by a qualified caregiver.

Response: DFPS is not revising the rule based on the comment, because the fiscal impact would need to be determined before the requirement could be proposed. However, DFPS is deleting the age limit in this rule for short personal restraints in order to match the current minimum standard rule.

§748.2455. What actions must a caregiver take before using a permitted type of emergency behavior intervention?

Comment: DFPS received two comments. One commenter expressed concern that the example given in the rule about restraining a child to administer insulin does not distinguish between a "medical restraint" and an emergency behavior intervention. One commenter requested clarification regarding the reference to a transitional hold in this rule.

Response: DFPS does not regulate "medical restraints" as a separate category of restraints. The rule matches current minimum standards. DFPS is, however, changing the term "transitional hold" to "short personal restraint."

§748.2459. What is the appropriate use for a short personal restraint?

Comment: DFPS received six comments. Five commenters pointed out an inconsistency between this rule and §749.2059. One commenter suggested that restraint not be allowed for use in stopping disruptive behaviors.

Response: DFPS is adopting this section with changes to be consistent with §749.2059. DFPS is not revising the rule in response to the last comment. The use of short personal restraint for disruptive behaviors is only allowed after other efforts to de-escalate the child's behavior have failed. This is allowed by current minimum standards.

§748.2461. What precautions must a caregiver take when implementing a short personal restraint?

Comment: One commenter requested clarification on the term "basket hold."

Response: DFPS is deleting the term "basket hold" from the rule. A minor editorial change is also made.

§748.2505. What information must a written order include?

Comment: One commenter requested clarification regarding the requirements to include in the order (1) the number of times a child may be restrained in a seven-day period; and (2) the plan for reducing the need for emergency behavior intervention if the order allows more than three restraints within a seven-day period.

Response: An order for an individual restraint does not need to include directives that cover a period of days. Therefore, these requirements are moved to §748.2507, which addresses PRN orders.

§748.2553. When must a caregiver release a child from an emergency behavior intervention?

Comment: One commenter requested that the time frame for releasing a child from seclusion once the child's behavior is no longer dangerous be increased from five minutes to 15 minutes.

Response: DFPS is adopting this section without change. Five minutes is a sufficient time period for determining that a child is no longer a danger to self or others. Leaving a child in seclusion for 15 minutes after the child has met criteria for release is excessive.

§748.2601. Who must monitor a personal restraint?

Comment: DFPS received two comments. The commenters complimented this rule, although one of them expressed concern about the expectation that a caregiver who is not involved in the restraint will be available to monitor the child.

Response: DFPS is revising the rule to clarify that a caregiver who is not involved in the restraint should monitor the child "if available." This does not change the requirement in §748.2605 that a caregiver not involved in the restraint monitor a prone or supine restraint in operations with a capacity of more than 16 children.

§748.2605. What personal restraint techniques are prohibited?

Comment: One commenter requested a clarification of the terms "basket hold" and "less restrictive intervention." This commenter also suggested that an observer not involved in the restraint be required for prone and supine restraints at all operations, not just those with a capacity of more than 16 residents.

Response: DFPS is adopting this section with a change to delete the term "basket hold." DFPS is not revising the rule based on other commenter concerns. Less restrictive intervention is a term used in current rules and is generally understood. Also, requiring an observer who is not involved in the restraint to monitor prone and supine restraints at operations with a capacity under 16 would result in a negative fiscal impact for those operations and require a re-proposal of the rule.

§748.2701. What are the additional responsibilities for implementing a mechanical restraint?

Comment: One commenter expressed concern about the language in this rule, which seemed to imply that a child might simultaneously be in seclusion and mechanical restraint.

Response: DFPS is adopting this section without change. The rule refers to the use of a window or one-way mirror. This language is not meant to imply that simultaneous seclusion and mechanical restraint are allowed. This is specifically prohibited in §748.2757.

§748.2751. May a caregiver successively use emergency behavior interventions on a child?

Comment: One commenter complimented this rule.

Response: DFPS is adopting this section without change.

§748.2753. May a caregiver simultaneously use emergency medication in combination with another emergency behavior intervention?

Comment: One commenter requested clarification as to whether or not it is necessary to obtain a new order each time an emergency medication needs to be given.

Response: This rule does not preclude PRN orders. DFPS is adopting this section without change.

§748.2801. What is the maximum length of time that an emergency behavior intervention can be administered to a child?

Comment: DFPS received two comments. One commenter expressed concern that the maximum time frames in this rule were not accompanied by a statement that the child must be released as soon as he is no longer a danger to self or others. One commenter requested a 30-minute time limit for prone restraints.

Response: DFPS is adopting this section without change. Section 748.2553 already requires that child be released as soon as he is no longer a danger to self or others. Prone restraints are limited to one minute in these rules because they significantly increase the risk of serious injury or death for the child.

§748.2851. What follow-up actions must caregivers take after the child's behavior no longer constitutes an emergency situation?

Comment: DFPS received two comments. One commenter expressed concern that this rule does not apply to seclusion of a child receiving emergency care services. One commenter expressed concern that restraint documentation is not required immediately after the restraint.

Response: This rule does not apply to seclusion of a child receiving emergency care services because seclusion of such a child is only allowed while awaiting the arrival of law enforcement or EMS. It is most likely in these circumstances that the child would be discharged. Also, the documentation requirement in this rule relates to supervisory review of the incident, not to documentation of the incident itself. Documentation is required within 24 hours for the incident and with 72 hours for the review of the incident, per §748.2855. DFPS is adopting this section with minor editorial changes including the deletion of the documentation requirement since it is already required in §748.2855.

§748.2855. When must a caregiver document the use of an emergency behavior intervention, and what must the documentation include?

Comment: One commenter was confused about the requirements of this rule.

Response: DFPS is not making changes because of the comment. Operations may request technical assistance from Licensing if they have questions about the language in this rule. DFPS is adopting the rule with a change to add the requirement to document de-escalation strategies used during the intervention, which is taken from current minimum standards, and other minor editorial changes.

§748.2901. What circumstances trigger a review of the use of emergency behavior intervention for a specific child?

Comment: One commenter was concerned that this rule does not require review of all emergency behavior interventions.

Response: DFPS is adopting this rule without change. The commenter's concern is addressed in §748.1385(9), which requires a review of emergency behavior interventions during the service plan review or update.

§748.2909. What if there are four triggered reviews within a 90-day period?

Comment: One commenter complimented this rule.

Response: DFPS is adopting this section without change.

§748.2951. What is an overall operation evaluation?

Comment: DFPS received two comments. One commenter complimented all rules in this division. One commenter asked a question about how to comply with the rule.

Response: Operations may request technical assistance from Licensing if they have questions about the language in this rule. DFPS is adopting this section without change.

§748.2953. What data must be collected?

Comment: DFPS received two comments, both with questions about this rule, including how it applies to operations that do not allow emergency behavior interventions.

Response: This rule applies to all operations, including those that do not allow emergency behavior interventions. Because operations that do not allow emergency behavior intervention may still use them, DFPS is not revising the rule based on comments. However, the rule is revised to clarify that operations are not required to collect data on short personal restraints, as operations are not required to document short personal restraints.

§748.3001. When must I have an annual sanitation inspection?

Comment: DFPS received six comments stating this rule is not consistent with what is required in Chapter 749 for child-placing agency foster homes.

Response: DFPS is adopting this section without change. The requirement for annual sanitation inspections is in current minimum standards. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3003. How must I document that a sanitation inspection has been completed?

Comment: One commenter stated that the requirement for documentation of a sanitation inspection should be deleted, as it is not required or addressed in Chapter 749.

Response: DFPS is not revising the rule as a result of the comment. See response for §748.3001.

§748.3019. Must I use a licensed exterminator to treat my operation for insects, rodents, and other pests?

Comment: DFPS received eight comments. Six commenters stated that this rule is not required in Chapter 749. One of the commenters stated that using a licensed exterminator to treat an operation for insects, rodents, and other pests adds costly training and certification, as well as has many financial implications for agencies that strive to keep their facilities rodent and pest free.

Response: DFPS is adopting this section without change. To prevent, control, or eliminate pest infestations, a person licensed under the Texas Structural Pest Control Board is required in the Structural Pest Control Act. Training costs would only be accrued in cases where the operation chooses to train an employee to be licensed under the Texas Structural Pest Control Board to provide such services to the operation.

§748.3021. How must I protect children from dangerous tools and equipment?

Comment: DFPS received eight comments. Seven commenters stated that the requirement to protect children from dangerous tools and equipment is not required in Chapter 749. Five of the commenters recommended deleting the requirement for "supervision, if appropriate based on the child's age, maturity, and treatment issues" and inserting "permission". In the least restrictive environment a child should be allowed and encouraged to perform tasks that are appropriate for their skill level.

Response: DFPS is adopting this rule with changes to be consistent with Chapter 749. The word "hammer" is deleted as an example of a dangerous tool, and the word "direct" regarding caregiver supervision is also deleted.

§748.3101. When must I have a fire inspection?

Comment: DFPS received eight comments. Two commenters stated that the requirement for fire inspections is not required in Chapter 749, and therefore, should be deleted. Six commenters stated that Chapter 749 only requires fire inspections every two years as opposed to annually.

Response: DFPS is adopting this section without change. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3107. What type of smoke-detection system must I have?

Comment: DFPS received eight comments. Seven commenters stated that the proposed smoke detector standards are not consistent with those proposed in Chapter 749. They do not have to have smoke detectors in the bedrooms or in the common rooms. Five of these commenters also suggested deleting the word "operation" in subsection (a) and replacing it with the word "building". Some might interpret "operation" to be an entire campus. Another commenter suggested other editorial changes. The commenter also stated that subsection (b) could be problematic unless smoke detectors are wired into the building power supply or components of the fire alarm system. There are no stand-alone battery powered smoke detectors for the hearing impaired. The same commenter suggested adding in subsection (c)(3) that smoke detectors must be interconnected so that if one alarm is activated, it will simultaneously activate the other alarms; and subsection (c)(4) to clarify that smoke alarms as components of a fire detection and alarm system do not require monthly testing.

Response: DFPS is adopting this section with changes based on commenter suggestions. Consistency with Chapter 749 is increased. DFPS is changing the areas where smoke detectors must be located to: hallways or open areas outside sleeping rooms; on each level of a building with multiple levels; and depending on the size and layout of the operation, additional smoke detectors may be required based on manufacturer's or fire inspector's instructions. DFPS is deleting the subsection that requires smoke detectors to be equipped so each person with a hearing impairment will be alerted, since the operation must have a system for addressing emergencies. Minor editorial changes are also made. The suggestions from the last commenter cannot be incorporated because the fiscal impact would need to be determined before the requirement could be proposed.

§748.3111. How often must the smoke detectors at my operation be tested?

Comment: DFPS received seven comments, all stating that there is a significant difference between the requirements in this rule and the CPA requirements in §749.2911. Two commenters suggested language changes to this rule.

Response: DFPS consulted the State Fire Marshal's office, and their edits are incorporated. No further change is made because this rule does not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3113. Must my operation have a fire-extinguishing system?

Comment: DFPS received eight comments. Seven commenters stated that this rule is not required or addressed in Chapter 749. One of these commenters suggested deleting the rule. One commenter recommended editorial changes and suggested that the rating of the fire extinguisher should be changed to not less than 3A:40BC.

Response: DFPS is adopting this section with minor editorial changes and two other changes: revising the fire extinguisher rating as suggested by a commenter and adding the following based on the recommendation of the State Fire Marshal's office: "(c) Any fire extinguisher that has been used or has lost operating pressure must be serviced or replaced immediately with an equivalent unit."

DFPS is not revising the rule because of the concern that this rule does not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require differ-

ent regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3115. How often must I inspect and service the fire extinguisher(s)?

Comment: One commenter suggested adding language that allows for fire extinguishers to be stored in a manner making it inaccessible to children if the method utilized has been inspected and approved by the fire marshal.

Response: Other than minor editorial changes, DFPS is adopting this rule without change based on the comment. The State Fire Marshal's office was consulted regarding this rule, and no change was made as a result. Fire extinguishers must be easily accessible to appropriate persons to respond to a fire emergency.

§748.3161. What steps must I take to ensure that heating devices do not present hazards to children?

§748.3235. Where must I post the emergency evacuation and relocation diagram?

Comment: DFPS received eight comments on each rule. Seven commenters on each rule stated that the rule is not required for CPA foster homes. One commenter on each rule suggested that the rule be deleted.

Response: DFPS is adopting §748.3235 without change. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes. DFPS is adopting §748.3161 with a minor editorial change.

§748.3237. What other safety provisions must I make?

Comment: One commenter stated that §748.3233(4)(E) allows for variation to children being able to open emergency exit doors easily from the inside. It was suggested that a provision be added to allow doors to be locked with a key with the written approval of the state or local fire marshal. This is needed by locked residential treatment centers.

Response: DFPS is changing §748.3237(c) to be consistent with §748.3233(b)(4)(E).

§748.3239. How often must I practice my emergency evacuation and relocation plans?

§748.3271. Must I have a first-aid kit at my operation?

Comment: DFPS received eight comments on each rule. Seven commenters on each rule stated that the rule is not required for CPA foster homes. One commenter on each rule suggested that the rule be deleted.

Response: DFPS is adopting these sections without change. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3301. What general physical site requirements must my operation meet?

Comment: DFPS received 11 comments. One commenter expressed concern about the requirement to have the grounds of the operation free of rodents and insects. Three commenters expressed concern about the requirement prohibiting treated wood and offered specific evidence refuting this as a significant safety issue. Seven commenters expressed concern that this rule does not match the requirements in Chapter 749.

Response: DFPS is adopting this section with changes so that only buildings must be free of rodents and insects and deleting the subsection regarding treated wood. Also, the current minimum standard requirements for window screens and lids for outdoor garbage cans are added.

No changes are made because this rule does not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3303. What parts of my operation must be ventilated?

§748.3305. What are the requirements for handrails, railings, and stairway and stairwell landings?

§748.3307. What are the requirements for lighting?

§748.3309. What are the requirements for a communication system?

§748.3313. May I use water from a private water system?

§748.3315. What are the requirements for running hot water?

§748.3317. May I use a septic system for sewage disposal?

§748.3357. What are the requirements for floor space in a bedroom used by a child?

§748.3369. What are the requirements for bunk beds?

§748.3391. What are the general requirements for bathroom facilities?

Comment: DFPS received six or seven comments regarding these rules. The commenters expressed concern that these rules do not match the requirements in Chapter 749.

Response: DFPS is adopting the rules without change as a result of the comments. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the commu-

nity. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes. DFPS is adopting §748.3303 with a minor editorial change.

§748.3311. What are the requirements for using a tractor?

Comment: DFPS received six comments. Two commenters expressed concern that this rule does not match the requirements in Chapter 749. Four commenters expressed concern that, particularly at ranch operations, each operation should be able to set their own policies about riding lawn mowers and tractors.

Response: DFPS is adopting this section with change, deleting the restrictions regarding riding lawn mowers from the rule and raising the age for operating a tractor from 14 years old to 16 years old. DFPS recognizes that children participate in ranching activities at several operations and have broadened the rule; however, riding a tractor is considered an occupational hazard for children under 16 and is prohibited by the Fair Labor Standards Act.

§748.3351. What are the requirements for general living space?

Comment: One commenter expressed concern about the portion of the rule that requires each child's bedroom to have at least one window with outside exposure as a source of natural light.

Response: No changes are made as a result of the comment. This portion of the rule includes a grandfather clause, so it will not have a financial impact for existing operations. However, the rule is adopted with changes to clarify that a floor plan is required with the application for a license and when changes are made, and to clarify that a child's personal storage space must be in the child's bedroom.

§748.3353. May I use a video camera to supervise a child in the child's bedroom?

Comment: One commenter requested that video monitoring be allowed as long as children change clothes in private, the operation uses a closed-circuit system, and the images are not taped.

Response: DFPS is adopting this section with changes, expanding the list of examples of situations which would allow for video monitoring, adding that each child must have another location where he can change clothes, and clarifying that video cameras may not be used to tape the child and images may not be accessible except to operation employees and caregivers.

§748.3355. May I use an audio monitoring device to supervise a child in the child's bedroom?

Comment: One commenter requested that the rule allow for audio monitoring of all children.

Response: For privacy reasons, DFPS disagrees with the comment. In addition, the rule does have exceptions when an audio monitoring device may be used. DFPS is not making changes based on the comment, but making minor editorial changes to make the rule more consistent with §748.3353.

§748.3359. What rooms may I not use as bedrooms?

Comment: DFPS received three comments. Two commenters suggested that a child should be able to sleep in a room that is not a bedroom when the child is admitted during sleeping hours. One commenter expressed concern that Chapter 749 allows the use of a basement for bedroom space, but this chapter does not.

Response: DFPS is adopting this section with a change that allows a child to sleep in a room that is not a bedroom if the child "is admitted to your operation during sleeping hours (for the first night only). These exceptions are permitted only if the child is provided with comfortable sleeping arrangements and if supervision of the child is not compromised." DFPS is not making changes as a result of the third comment. Basements are permitted in operations regulated under this chapter under a grandfather clause. However, no new operations may use basements as bedrooms, since a new operation can more easily accommodate bedroom space elsewhere.

§748.3393. What are the requirements for a toilet that a child uses?

Comment: One commenter stated that sanitary sewer systems are not always "community" systems and asked that the rule be revised to allow all sanitary sewer systems.

Response: DFPS is adopting this section with a change, deleting the word "community." The revision allows for use of any sanitary sewer system, as requested by the commenter.

§748.3441. What general requirements apply to food service and preparation?

Comment: DFPS received six comments. One commenter requested that dented cans be allowed as long as the food is not contaminated. Five commenters expressed concern that these rules do not match the requirements in Chapter 749.

Response: DFPS is adopting this section with changes by requiring persons who handle food for a group to minimize food contamination through the use of utensils, and deleting the prohibition against dented cans. The deletion does not present a health or safety issue, as other portions of the rule require food to be safe and stored in a sanitary manner. No change is made related to the concern that this rule does not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3471. What are the minimum safety requirements for outdoor equipment?

§748.3473. How high must platform guardrails be?

§748.3475. What special maintenance procedures must I follow for my playground?

§748.3477. What are the specific safety requirements for swings?

§748.3479. May I have indoor equipment such as climbing equipment or platforms?

§748.3481. If my operation was previously granted a permit by Licensing, will I be given additional time to comply with the requirements of this division?

§748.3521. What does the term "use zone" mean?

§748.3523. How do I measure the use zone for stationary equipment?

§748.3525. How do I measure the use zone for slides?

§748.3527. How do I measure the use zone for to-fro swings?

§748.3529. How do I measure the use zone for tire swings?

§748.3531. How do I measure the use zone for bucket swings?

§748.3533. How do I measure the use zone for rotating or rocking equipment or for track rides?

§748.3535. If my operation was previously granted a permit by Licensing, will I be given additional time to comply with the requirements of this division?

§748.3561. Where must I install protective surfacing?

§748.3563. What are the requirements of protective surfacing for use zones?

§748.3565. What documentation must I keep at the operation if I use unitary surfacing materials?

§748.3567. If my operation was previously granted a permit by Licensing, will I be given additional time to comply with the requirements of this division?

§748.3601. What are the requirements for swimming pools that a child uses?

§748.3603. What are the additional requirements for a swimming pool located at my operation?

§748.3605. What are the safety requirements for wading/splashing pools at my operation?

§748.3607. What are the requirements for a hot tub?

Comment: DFPS received seven comments regarding these rules. The commenters expressed concern that these rules do not match the requirements in Chapter 749.

Response: DFPS is adopting §748.3471 with a change to add slides to the portion of the rule that prohibits installing equipment over asphalt without proper unitary surfacing material. This requirement is already addressed in other rules, but is recommended as an addition here for clarity and consistency. The other rules are adopted without change. No change is made related to the concern that this rule does not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. Furthermore, the physical facilities of residential operations are specifically designed to care for children, while foster home care is provided in the private homes of people living in the community. The combination of higher risks in higher numbers and the regulatory flexibility necessary in regulating a private home setting result in different standards for residential operations and foster homes.

§748.3701. What are my responsibilities for providing opportunities for recreational activities and physical fitness?

Comment: DFPS received eight comments. One commenter suggested deleting "including family activities" in subsection (e)(1)(B). Five commenters stated that subsection (e)(1)(B) is different from §749.1921(e)(1)(B). Another commenter stated that documentation of this level of specificity is burdensome and not valuable. Special needs in this area can also be addressed in the service plan.

Response: DFPS is adopting this section with changes to delete some of the requirements, including "including family activities" and one of the documentation requirements, as suggested by commenters.

§748.3705. What are higher risk recreational activities?

§748.3707. Does Licensing regulate higher risk recreational activities?

§748.3709. What are the requirements when children participate in a higher risk recreational activity?

§748.3711. Who must supervise a higher risk recreational activity?

§748.3713. What duties are required for a person supervising higher risk recreational activities?

§748.3715. Where must the written plan for action be kept?

§748.3717. What instruction must a caregiver have regarding the plan for action?

Comment: DFPS received nine comments regarding these rules. Seven commenters stated that the rules are not required for CPA foster homes. One of these commenters suggested deleting the rules. One commenter stated that the rules require a written plan of action in case of natural disaster be on file, with the supervisor of the high-risk activity giving instruction on this plan to all staff involved in each activity. The commenter stated that this means that they would have to go through this process every time they saddle a horse for a resident and stated that this was excessive.

Response: No change is made related to the concern that the rules do not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. The combination of higher risks in higher numbers results in different standards for residential operations and foster homes.

Section 748.3717 is adopted with a change based on the last comment, deleting the words "prior to departing."

§748.3719. May children in care use all-terrain vehicles?

Comment: DFPS received eight comments. Seven commenters stated that this rule is not required for CPA foster homes. One of these commenters suggested deleting the rule.

Response: DFPS is adopting this section without change. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. The combination of higher risks in higher numbers results in different standards for residential operations and foster homes.

§748.3751. Must a certified lifeguard be on duty during an activity involving a body of water?

Comment: DFPS received seven comments. One commenter stated that the American Red Cross has nationally accepted guidelines specifying when the individual supervising swimming activities should be water safety certified or certified as a lifeguard based on pool size and depth. Five commenters recommended amending this answer by inserting "when involved in boating activities, each child must wear a personal flotation device". As currently written, a child would not be allowed to go water skiing without having a "lifeguard" in each boat.

Response: No change is made based on the first comment, as the requirement for a lifeguard is in current minimum standards and is valuable in ensuring the health and safety of children in care. DFPS is adopting a change to clarify a lifeguard is not

needed for watercraft activities, however, you must comply with the requirements relating to watercraft activities.

§748.3757. What are the child/adult ratios for swimming activities?

Comment: One commenter wanted to know how the "adult ratio" (1:8) relates to "caregiver ratio" (1:5) and if §748.3709 means that a provider will have to have more than the caregiver ratio.

Response: DFPS is adopting the rule with the following changes: Subsection (a) regarding the swimming ratio for children five years old or older is changed to cross reference appropriate child/caregiver ratios provided in §748.1003 (relating to For purposes of the child/caregiver ratio, how many children can a single caregiver care for during the children's waking hours?). Subsection (c) is revised to include the words "When a child who is *non-ambulatory or who is subject to seizures*." to be consistent with current minimum standards

§748.3803. What are the requirements for watercraft activities?

Comment: One commenter stated that it seems inconsistent that the watercraft activities do not require a lifeguard, but the swimming activities do.

Response: DFPS is adopting the rule with a change to clarify in subsection (b) the purpose for adults being at the shoreline and/or on the water by adding the language "to respond to emergencies."

§748.3841. What are the requirements for hiking or camping excursions?

§748.3843. What are the requirements for monitoring children's safety and health during hiking or camping excursions?

§748.3847. Where must the itinerary be kept?

§748.3849. What are the requirements for shelter during an overnight excursion?

§748.3851. What are the requirements for bed equipment used during an overnight excursion?

§748.3853. What are the specific requirements for storing food during a hiking or camping excursion?

§748.3855. What requirements must I meet for food utensils and equipment when camping?

§748.3857. What parameters must I follow for drinking water during a hiking or camping excursion?

§748.3859. How must I maintain equipment or chemicals used for disinfecting water?

§748.3861. What are the requirements for toilet facilities during overnight camping excursions?

Comment: DFPS received six or seven comments on each of these rules. The commenters stated that these requirements are not required for CPA foster homes in Chapter 749.

Response: No change is made related to the concern that the rules do not match Chapter 749. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. The combination of higher risks in higher numbers results in different standards for residential operations and foster homes. Some editorial changes are made to §748.3855 and §748.3861.

§748.3845. What type of itinerary must I have for hiking, camping excursions, or field trips?

Comment: DFPS received seven comments. The commenters stated that these requirements are not required for CPA foster homes. Five of these commenters suggested amending subsection (a) by deleting "over two hours" and inserting "overnight" for hiking, camping excursions, or field trips requiring an itinerary. A trip to the movie or zoo will last more than two hours. Another commenter made a similar statement and recommended that the requirement for an itinerary be deleted.

Response: DFPS is adopting this rule with changes. DFPS agrees that two hours is too short a period of time to require an itinerary for hiking, camping excursions, or field trips. The rule is changed to apply to field trips lasting more than five hours, rather than two. Editorial revisions are also made.

§748.3931. Are weapons, firearms, explosive materials, and projectiles permitted at my operation?

Comment: DFPS received seven comments. One commenter stated that they do not have enough staff for one-to-one supervision for a child using a firearm, so other adults assist in this activity. Five other commenters made similar comments stating that "professional" individuals often volunteer to support these programs and are far better trained then some staff in handling firearms. These five commenters suggested amending paragraph (5) by deleting "caregiver" and inserting "qualified adult" as the person to provide supervision.

Response: DFPS agrees with the commenter and made the suggested edit to paragraph (5) by deleting the word "caregiver" and replacing it with supervision requirements by a "qualified adult".

§748.4007. What specific information and equipment must be in a vehicle I use to transport children during overnight trips away from the operation?

§748.4011. What safety precautions must I take when loading and unloading a child from the vehicle?

Comment: DFPS received up to eight comments on these rules. The commenters pointed out these are not required for child-placing agency foster homes, and some commenters recommended that the rules be deleted.

Response: These rules are adopted without change. Because residential operations, by definition, care for more children than foster homes and often use varying staff, there are higher risks that require different regulations. The combination of higher risks in higher numbers results in different standards for residential operations and foster homes.

§748.4013. What is required when my operation takes children on out-of-state overnight trips?

Comment: DFPS received seven comments. Two commenters pointed out this is not required for child placing agency foster homes, and one recommended the rule be deleted. Five commenters recommended deleting subsection (a)(3) and allow some of this to be incorporated into admission information given to parents.

Response: DFPS is adopting the rule with editorial changes and replacing the requirement to notify parents two weeks before the departure date with the requirement to inform parents before the planned departure date, and document the date and discussion.

§748.4043. Do the seat belt requirements prohibit transporting children in the bed of a pick-up truck?

Comment: DFPS received eight comments. Two commenters recommended that this be allowed on the facility's property. Five commenters recommended this rule be amended by inserting "children may ride in the bed of a pick-up on campus as long as they remain seated at all times".

Response: DFPS is adopting the section with changes in response to comments. Children doing farm-related activities will be allowed to ride in the bed of a pick-up truck under certain conditions.

§748.4431. What are the requirements for an adventure/challenge program that requires spotting or belaying?

Comment: DFPS received two comments. The commenters stated that the Association of Challenge Course Technology already provides standards on adventure/challenge programs. It was recommended that experts in the field regulate these activities. One of these commenters suggested requiring facilities with adventure/challenge programs to have annual inspections of physical facilities performed by the Association of Challenge Course Technology (ACCT), and comply with ACCT requirements for facilitators.

Response: DFPS contacted The Association of Challenge Course Technology regarding this proposed rule. This organization indicated that they did not have standards that addressed personnel requirements but rather address the care of the equipment. DFPS is adopting this section without change.

In addition to changes resulting from comments, DFPS is adopting the following rules with changes:

§748.67. What are the requirements for a transitional living program? DFPS is adding: "Accessing community and other resources" as a necessary component of a transitional living program.

§748.101. What are my responsibilities as the permit holder before I begin operating? DFPS is moving two paragraphs of this rule regarding the legal basis and ownership of your operation to §745.243, which lists other information that must be submitted with an application for a license.

§748.133. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it? DFPS is changing from 15 days to 2 days the required time frame in this rule for notifying Licensing of a change in the composition of the governing body to make the rule consistent with requirements in Chapter 745.

§748.537. What must the system for ensuring that an employee is available to handle emergencies include? DFPS is adding subsection (c) to clarify that the person on-call to handle emergencies is not required to be a Licensed Child Care Administrator.

§748.723. Are there additional requirements for a volunteer or contractor that performs employee functions? References to student interns are deleted, because interns are already regulated as volunteers or as staff.

§748.1213. What information must I provide caregivers when I admit a child? Based on a comment from Chapter 749, DFPS is editing this rule and clarifying "a child's immediate needs" by adding "such as enrolling the child in school or obtaining needed medical care or clothing."

§748.1269. For an emergency admission, when must I complete all of the requirements for an admission assessment? The current rule says a child receiving treatment services can only stay in care for 30 days, unless a psychological is conducted that indicates the child needs treatment services. This rule clarifies the time limit for residential treatment centers is 10 days.

§748.1271. At the time of an emergency admission, what information must I document in the child's record at admission? DFPS is adding new paragraphs to be consistent with the requirements for non-emergency admissions, which require documentation of the date of the child's admission and documentation of any allergies and chronic health conditions. DFPS is also making editorial changes and adding a requirement to include known contraindications to the use of a restraint, based on a comment to §748.1537.

§748.1347. What must I document regarding a professional level service provider's participation in the development of an initial service plan? DFPS is deleting the requirement to document comments or input made by professional level service providers in the development of an initial service plan. Editorial changes are also made to this subsection as a result of the revision. The subsection regarding the effective date of the plan is deleted.

§748.1349. With whom do I share the initial service plan? DFPS is clarifying that caregivers must be given a copy or summary of an initial service plan, and you must document that it was given to the parents.

§748.1387. Are the notification, participation, implementation, and documentation requirements for a service plan review and update the same as for an initial service plan? DFPS is revising the title of the rule to clarify that the notification requirements for a service plan review and update are the same as for an initial service plan.

§748.1445. What must I document in the child's record at the time of an emergency discharge or transfer? DFPS is adding new paragraphs regarding documentation at the time of an emergency discharge or transfer, including the explanation given to the child regarding the reason for the discharge, and the child's reaction to the discharge.

§748.1481. To whom may I release a child? Subsection (a) is revised so that a child may be released to a person authorized by law to take possession of the child.

§748.1505. Who must perform dental examinations and provide dental treatment? This section is adopted with changes to make it consistent with rule changes regarding a health-care professional licensed in the United States to practice dentistry.

§748.1551. How often must the physician review a child with primary medical needs? This section is revised to make it consistent with other rule changes regarding when a licensed physician must review a child's primary medical needs.

§748.1581. What health precautions must I take if someone in my operation has a communicable disease? DFPS is adopting this section with changes for clarity. Licensing met with DSHS staff and made changes as a result of their written and verbal comments.

§748.1697. What are the specific requirements for feeding toddlers and older children?

§748.1709. What are the requirements for using a nasogastric tube to feed a child?

The changes to these rules make them consistent with the same requirements in Chapter 749, see §749.3075 and §749.3077.

§748.1931. After a child in my care turns 18 years old, may the person remain in my care?

§748.1933. May I admit a young adult into care? These rules are revised to comply with Senate Bill (S.B.) 6 to permit a young adult to remain in care up to the age of 22 years old in order to: transition to independence, including attending college or vocational or technical training; and attend high school, a program leading to a high school diploma, or GED classes.

§748.2501. Are written orders required to administer emergency behavior intervention, and if so, who can write them? This section is adopted with a change to clarify when orders are required for personal restraints. Commenters for Chapter 749 expressed confusion about when orders are required for personal restraints. Both chapters are revised to clarify this issue.

§748.2507. Under what conditions are PRN orders permitted for a specific child? Requirements from §748.2505 are added. An order for an individual restraint does not need to include directives that cover a period of days. Therefore, these requirements are moved to the rule that addresses PRN orders.

§748.3061. When must my operation be inspected for gas leaks? This section is adopted with a change to require inspections for gas leaks at least once every 24 months as recommended by the LP-gas section of the Texas Railroad Commission, as opposed to every 12 months as proposed.

§748.3117. How often must the state or local fire inspector inspect fire extinguisher(s)? This section is adopted with changes recommended by the State Fire Marshal's office.

§748.3395. What are the requirements for hand-washing sinks that a child uses? This section clarifies that water must be under sufficient pressure to meet the demands of the children.

§748.3397. What are the requirements for bathing facilities? This clarifies that water must be under sufficient pressure to meet the demands of the children and deletes the portion of the rule regarding Americans with Disabilities Act (ADA) requirements. ADA requirements can be enforced without rules, and are generally enforced by other agencies.

§748.4231. What information must an admission assessment include for a child needing emergency care services, including respite child-care services? "Chronic health conditions" is added as information required to be in the child's record as soon as possible after admission. This addition is taken from current minimum standards.

§748.4267. How long may a child be in respite child-care? This section adds that a child may remain in temporary substitute care for up to 60 days while the child's foster home is under investigation for abuse or neglect. This does not count toward nor is it limited by the 14 consecutive days or 40 days each year time frames for respite child-care services.

In addition, DFPS is making minor editorial changes to the following rules: §§748.73, 748.75, 748.309, 748.313, 748.573 748.801, 748.987, 748.989, 748.1221, 748.1339, 748.1611, 748.1631, 748.2201, 748.2203, 748.2451, 748.2853, 748.2907, 748.3017, 748.3103, 748.3109, 748.3119, 748.3193, 748.3233, 748.3237, 748.3303, 748.3361, 748.3363, 748.4261, 748.4263, 748.4265, 748.4269, 748.4301, 748.4331, 748.4361, 748.4365, 748.4369, 748.4371, 748.4397, 748.4401, 748.4403, 748.4465, and 748.4469.

SUBCHAPTER A. PURPOSE AND SCOPE

40 TAC §748.1, §748.3

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DEFINITIONS AND SERVICES

DIVISION 1. DEFINITIONS

40 TAC §748.41, §748.43

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.43. What do certain words and terms mean in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. The following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) Accredited college or university--An institution of higher education accredited by one of the following:

(A) Southern Association of Colleges and Schools, Commission on Colleges;

(B) Middle States Association of Colleges and Schools, Commission on Higher Education;

(C) New England Association of Schools and Colleges, Commission on Institutions of Higher Education;

(D) North Central Association of Colleges and Schools, The Higher Learning Commission;

(E) Northwest Commission on Colleges and Universities;

(F) Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities; or

(G) Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges.

(2) Activity space--An area or room used for child activities.

(3) Adaptive functioning--Refers to how effectively a person copes with common life demands and how well the person meets standards of personal independence expected of someone in his particular age group, sociocultural background, and community setting.

(4) Adult--A person 18 years old or older.

(5) Caregiver--A person counted in the child/caregiver ratio, whose duties include the direct care, supervision, guidance, and protection of a child. This does not include a contract service provider who:

(A) Provides a specific type of service to your operation for a limited number of hours per week or month; or

(B) Works with one particular child.

(6) Certified lifeguard--A person who has been trained in rescue techniques, life saving, and water safety by a qualified instructor from a recognized organization that awards a certificate upon successful completion of the training. A certified lifeguard ensures the safety of persons by preventing and responding to water related emergencies.

(7) Child/caregiver ratio--The maximum number of children for whom one caregiver can be responsible.

(8) Child in care--A child or a young adult who is currently admitted as a resident of a general residential operation or residential treatment center, regardless of whether the child is temporarily away from the operation, as in the case of a child at school or at work. Unless a child has been discharged from the operation, he is considered a child in care.

(9) Child passenger safety seat system--An infant or child passenger restraint system that meets the federal standards for crash-tested restraint systems as set by the National Highway Traffic Safety Administration.

(10) Counseling--A procedure used by professionals from various disciplines in guiding individuals, families, groups, and communities by such activities as delineating alternatives, helping to articulate goals, processing feelings and options, and providing needed information. This definition does not include career counseling.

(11) Days--Calendar days, unless otherwise stated.

(12) De-escalation--Strategies used to defuse a volatile situation, to assist a child to regain behavioral control, and to avoid a physical restraint or other behavioral intervention.

(13) Department--The Department of Family and Protective Services (DFPS).

(14) Discipline--Guidance that is constructive or educational in nature and appropriate to the child's age, development, situation, and severity of the behavior.

(15) Disinfecting solution--A disinfecting solution may be:

(A) A self-made solution, prepared as follows:

(i) One tablespoon of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting such items as toys, eating utensils, and nonporous surfaces (such as tile, metal, and hard plastics); or

(ii) One-fourth cup of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting surfaces such as bathrooms, crib rails, diaper-changing tables, and porous surfaces, such as wood, rubber or soft plastics; or

(B) A commercial product that meets the Environmental Protection Agency's (EPA's) standards for "hospital grade" germicides (solutions that kill germs) that you must use according to label directions.

(16) Emergency Behavior Intervention--Interventions used in an emergency situation, including personal restraints, mechanical restraints, emergency medication, and seclusion.

(17) Family members--An individual related to another individual within the third degree of consanguinity or affinity. For the definitions of consanguinity and affinity, see Chapter 745 of this title (relating to Licensing). The degree of the relationship is computed as described in Government Code, §573.023 (relating to Computation of Degree of Consanguinity) and §573.025 (relating to Computation of Degree of Affinity).

(18) Field trip--A group activity conducted away from the operation.

(19) Food service--The preparation or serving of meals or snacks.

(20) Full-time--At least 30 hours per week.

(21) Garbage--Food or items that when deteriorating cause offensive odors and/or attract rodents, insects, and other pests.

(22) General Residential Operation--A residential child-care operation that provides child care for 13 or more children or young adults. The care may include treatment services and/or programmatic services. These operations include formerly titled emergency shelters, operations providing basic child care, operations serving children with mental retardation, and halfway houses. A residential treatment center is not a general residential operation.

(23) Group of children--Children assigned to a specific caregiver or caregivers. Generally, the group stays with the assigned caregiver(s) throughout the day and may move to different areas throughout the operation, indoors and out. For example, children who are assigned to specific caregivers occupying a unit or cottage are considered a group.

(24) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

(25) Human services field--A field of study that contains coursework in the social sciences of psychology and social work including some counseling classes focusing on normal and abnormal human development and interpersonal relationship skills from an accredited college or university. Coursework in guidance counseling does not apply.

(26) Immediate danger--A situation where a prudent person would conclude that bodily harm would occur if there were no immediate interventions. Immediate danger includes a serious risk of suicide, serious physical injury, or the probability of bodily harm resulting from a child running away if under 10 years old chronologically or developmentally. Immediate danger does not include:

(A) Harm that might occur over time or at a later time; or

(B) Verbal threats or verbal attacks.

(27) Infant--A child from birth through 17 months.

(28) Livestock--An animal raised for human consumption or an equine animal.

(29) Living quarters--A structure or part of a structure where a group of children reside, such as a building, house, cottage, or unit.

(30) Non-ambulatory--A child that is only able to move from place to place with assistance, such as a walker, crutches, a wheelchair, or prosthetic leg.

(31) Non-mobile--A child that is not able to move from place to place, even with assistance.

(32) Operation--General residential operations and residential treatment centers.

(33) Person legally authorized to give consent--The person legally authorized to give consent by the Texas Family Code or a person authorized by the court.

(34) Physical force--Pressure applied to a child's body that reduces or eliminates the child's ability to move freely.

(35) PRN--A standing order or prescription that applies "pro re nata" or "as needed according to circumstances."

(36) Regularly--On a recurring, scheduled basis.

(37) Residential Treatment Center (RTC)--A residential child-care operation for 13 or more children or young adults that exclusively provides treatment services for children with emotional disorders.

(38) Sanitize--A four-step process that must be followed in the subsequent order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least 10 minutes. Rinsing with cool water only those items that a child is likely to place in his mouth; and

(D) Allowing the surface or article to air-dry.

(39) School-age child--A child five years old or older who will attend school in August or September of that year.

(40) Seat belt--A lap belt and any shoulder strap included as original equipment on or added to a motor vehicle.

(41) Service plan--A plan that identifies a child's basic and specific needs and how those needs will be met.

(42) State or local fire inspector--A fire official designated by the city, county, or state government.

(43) State or local sanitation official--A sanitation official designated by the city, county, or state government that is trained in sanitary science to perform duties relating to education and inspections in environmental sanitation.

(44) Substantial bodily harm--Physical injury serious enough that a prudent person would conclude that the injury required professional medical attention. It does not include minor bruising, the risk of minor bruising, or similar forms of minor bodily harm that will resolve healthily without professional medical attention.

(45) Toddler--A child from 18 months through 35 months.

(46) Treatment director--The person responsible for the overall treatment program providing treatment services. A treatment director may have other responsibilities and may designate treatment director responsibilities to other qualified persons.

(47) Universal precautions--An approach to infection control where all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(48) Volunteer--A person who provides:

(A) Child-care services, treatment services, or programmatic services under the auspices of the operation without monetary compensation, including a "sponsoring family;" or

(B) Any type of services under the auspices of the operation without monetary compensation when the person has unsupervised access to a child in care.

(49) Water activities--Activities related to the use of splashing pools, wading pools, swimming pools, or other bodies of water.

(50) Young adult--An adult whose chronological age is between 18 and 22 years, who is currently in a residential child-care operation, and who continues to need child-care services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. SERVICES

40 TAC §§748.61, 748.63, 748.65, 748.67, 748.69, 748.71, 748.73, 748.75

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.61. What types of services does Licensing regulate?

We regulate the following types of services:

(1) Child-Care Services--Services that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning;

(2) Treatment Services--In addition to child-care services, a specialized type of child-care services designed to treat and/or support children with:

(A) Emotional Disorders, such as mood disorders, psychotic disorders, or dissociative disorders, and who demonstrate three or more of the following:

(i) A Global Assessment Functioning of 50 or below;

(ii) A current DSM diagnosis;

(iii) Major self-injurious actions, including recent suicide attempts;

(iv) Difficulties that present a significant risk of harm to self or others, including frequent or unpredictable physical aggression; or

(v) A primary diagnosis of substance abuse or dependency and severe impairment because of the substance abuse;

(B) Mental Retardation, who have an intellectual functioning of 70 or below and are characterized by prominent, significant deficits and pervasive impairment in one or more of the following areas:

(i) Conceptual, social, and practical adaptive skills to include daily living and self care;

(ii) Communication, cognition, or expressions of affect;

(iii) Self-care activities or participation in social activities;

(iv) Responding appropriately to an emergency; or

(v) Multiple physical disabilities, including sensory impairments;

(C) Pervasive Developmental Disorder, which is a category of disorders (e.g. Autistic Disorder or Rett's Disorder) characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas of development:

(i) Conceptual, social, and practical adaptive skills to include daily living and self care;

(ii) Communication, cognition, or expressions of affect;

(iii) Self-care activities or participation in social activities;

(iv) Responding appropriately to an emergency; and

(v) Multiple physical disabilities including sensory impairments; or

(D) Primary Medical Needs, who cannot live without mechanical supports or the services of others because of non-temporary, life-threatening conditions, including the:

(i) Inability to maintain an open airway without assistance. This does not include the use of inhalers for asthma;

(ii) Inability to be fed except through a feeding tube, gastric tube, or a parenteral route;

(iii) Use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross-infection or contamination, or prevent tissue breakdown; or

(iv) Multiple physical disabilities including sensory impairments; and

(3) Additional Programmatic Services, which include:

(A) Emergency Care Services--A specialized type of child-care services designed and offered to provide short-term child care to children who, upon admission, are in an emergency constituting an immediate danger to the physical health or safety of the child or the child's offspring;

(B) Transitional Living Program--A residential services program designed to serve children 14 years old or older for whom the service or treatment goal is basic life skills development toward independent living. A transitional living program includes basic life skills training and the opportunity for children to practice those skills. A transitional living program is not an independent living program;

(C) Assessment Services Program--Services to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facilitate service planning;

(D) Therapeutic Camp Services--A camping program to augment an operation's treatment services with an experiential curriculum exclusively for a child with an emotional disorder who has difficulty functioning in his home, school, or community. Therapeutic camp services are only available to children 13 years old and older; and

(E) Respite Child-Care Services--See §748.73 of this title (relating to What are respite child-care services?).

§748.65. What children are eligible to participate in a transitional living program?

(a) For a child to be eligible to participate in a transitional living program, the child must:

(1) Be 14 years old or older; and

(2) Not be receiving therapeutic camp services.

(b) For a child to be eligible to receive the level of caregiver supervision described in §748.1019 of this title (relating to What are the supervision requirements for a transitional living program?) or §748.1021 of this title (relating to When does a child who is in a transitional living program not need supervision?), the child must be 16 years old or older.

§748.67. What are the requirements for a transitional living program?

A transitional living program must have a training program for children that develops competency in the following areas:

(1) Health, general safety, and fire safety practices;

(2) Money management;

(3) Transportation skills;

(4) Accessing community and other resources; and

(5) Child health and safety, child development, and parenting skills, if the child is a parent of a child living with him.

§748.71. May I have an independent living program?

Your operation may not provide an independent living program for a child in care under 18 years old.

§748.73. What are respite child-care services?

Respite child-care services are planned alternative 24-hour care that an operation provides for a child as part of the regulated child care.

§748.75. May I use or provide respite child-care services?

Only general residential operations that offer emergency care services may provide respite child-care services. Other operations may not provide respite child-care services, and no operation may use respite child-care services. The purpose of respite child-care services is to provide relief to a child's biological or foster parent, not an employee. Respite for an employee is provided through time off, vacations, holidays, and sick leave.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION
DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §§748.101, 748.103, 748.105, 748.107, 748.109, 748.111

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.101. What are my responsibilities as the permit holder before I begin operating?

Before you begin operating, you are responsible for:

(1) Ensuring that your operation is legally established to operate within Texas and is complying with all applicable statutes;

(2) Establishing the governing body of the operation;

(3) Having a governing body that is responsible for, and has authority over, the policies and activities of the operation;

(4) Having policies that clearly state the responsibilities of the governing body; and

(5) Developing operational policies and procedures that comply with or exceed the rules specified in this chapter, Chapter 42 of the Human Resources Code, Chapter 745 of this title (relating to Licensing), and other applicable laws.

§748.103. What are my operational responsibilities as the permit holder?

When you begin operating, you must:

(1) Designate a full-time child-care administrator who meets the minimum qualifications of §748.531 of this title (relating to What qualifications must a child-care administrator meet?);

(2) Operate according to the written policies and procedures adopted by the governing body;

(3) Maintain true, current, accurate, and complete records at your operation for us to review;

(4) Ensure that all required documentation is current, accurate, and complete;

(5) Allow us to inspect your operation during its hours of operation;

(6) Display your permit at the operation;

(7) Observe the conditions of your permit;

(8) Not offer unrelated types of services that conflict or interfere with the best interests of a child in care, a caregiver's responsibilities, or operation space. If you offer more than one type of service, you must determine and document that no conflict exists;

(9) Maintain liability insurance as required by the Human Resources Code, §42.049;

(10) Comply with Chapters 42 and 43 of the Human Resources Code and the rules of this chapter, and all other applicable laws and rules of the Texas Administrative Code;

(11) Prepare the annual budget and controlling expenditures to ensure the needs of the children are met; and

(12) Ensure that no member of the governing body, member of the executive committee, member of management, or employee is listed as a sustained controlling person.

§748.105. What responsibilities do I have for personnel policies and procedures?

You must:

(1) Develop a written organizational chart showing the administrative, professional, and staffing structures and lines of authority;

(2) Develop written job descriptions, including minimum qualifications and job responsibilities for each position;

(3) Develop written policies on the training requirements for employees;

(4) Develop written policies on whether your operation permits individual caregivers to take children away from the operation for day or overnight visits. The policy must require obtaining the parents' written approval prior to allowing an overnight visit with staff. The policy must also address the issues outlined in §748.685(e) of this title (relating to What responsibilities does a caregiver have when supervising a child or children?);

(5) Ensure that personnel policies comply with personnel requirements outlined in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(6) Report or ensure your employees report suspected abuse, neglect, or exploitation as required by the Texas Family Code, §261.401;

(7) Ensure that all employees and consulting, contracting, and volunteer professionals who work with a child and others with access to information about a child are informed in writing of their responsibility to maintain child confidentiality; and

(8) Either adopt the model drug testing policy or have a written drug testing policy that meets or exceeds the criteria in the model policy provided in §745.4151 of this title (relating to What drug testing policy must my residential child-care operation have?).

§748.109. May I exceed my operation capacity?

No, the number of children in your care must not exceed the capacity stated on your permit. For the purpose of determining whether you exceed your capacity, the number of children in your care includes a caregiver's own children who are at the operation, if they share general living space, bedroom, and/or bathroom space with children in care, and any children receiving respite child-care services at an operation providing emergency care services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. GOVERNING BODY

40 TAC §748.131, §748.133

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.131. What are the specific responsibilities of the governing body?

The governing body is responsible for:

(1) Ensuring the operation remains fiscally sound;

(2) Overseeing and ensuring the management of the operation's services and programs in compliance with your policies;

(3) Approving and having authority over the operational policies and activities which must comply with rules of this chapter;

(4) Complying with the law, including Chapters 42 and 43 of the Human Resources Code, the applicable rules of this chapter, and other applicable rules in the Texas Administrative Code;

(5) Ensuring that persons employed by or working at the operation, any family members of the owner or governing body members, paid consultants, or others who benefit financially from the operation, such as subcontractors or vendors, do not comprise a majority of the voting members of the governing body:

(A) Operations that are granted a permit by us before January 1, 2007, have two years to comply with this paragraph; and

(B) Operations that are granted a permit by us after January 1, 2007, have two years from the date the operation is licensed by us to comply with this paragraph; and

(6) Carrying out governing body responsibilities assigned in the policies and procedures.

§748.133. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it?

You must provide to us in writing any change in:
Figure: 40 TAC §748.133

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. GENERAL FISCAL REQUIREMENTS

40 TAC §748.161, §748.163

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.161. What are my fiscal requirements?

You must:

(1) Submit documentation of a 12-month budget of income and expenses to us with the application for a new permit;

(2) Submit documentation of reserve funds or available credit at least equal to operating costs for the first three months of operation to us with the application for a new permit;

(3) Have predictable funds sufficient for the first year of operation;

(4) Demonstrate at all times that you have or will have sufficient funds to provide appropriate services for all children in care; and

(5) Account for a child's money separately from the funds of the operation. No child's personal earnings, allowances, or gifts may be used to pay for the child's room and board, unless such a use is a part of the child's service plan and the child's parent approves it in writing. You must give or send the child's money to the child, parent, or next placement within 30 days of the child's discharge.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. REQUIRED POSTINGS

40 TAC §748.191

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.191. What items must I post at my operation?

The items listed below must be posted in a prominent and publicly accessible place where employees, children, parents, and others may easily view them at all times:

(1) Your permit;

(2) The Licensing notice *Keeping Children Safe*;

(3) Emergency and evacuation relocation plans posted in each building and living quarters used by children; and

(4) A general daily schedule for routine activities for children in care.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. POLICIES AND PROCEDURES

40 TAC §§748.231, 748.233, 748.235, 748.237, 748.239

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.231. What are the general requirements for my operation's policies?

(a) The requirements for policies only apply to the operation's policies that are required or governed by this chapter.

(b) The policies must be written and they must indicate the approval of the governing body, date of approval, and effective date.

(c) The policies must be clearly stated and comply with the rules of this chapter.

(d) All employees must be aware of and follow your policies and procedures. A copy of your policies and procedures must be maintained at the operation and available for employees' review.

(e) All policies must be available for review by our staff and your clients, upon request.

(f) You must report any significant change to the policies to us at least seven days before implementing the change.

(g) You must maintain copies of all current and previous policies for at least two years.

§748.235. What child-care policies must I develop?

You must develop policies that describe:

(1) Visitation rights between the child and family members and the child and friends;

(2) The child's rights to correspond by mail with family members and friends, including any policies regarding mail restrictions and receipt of electronic mail;

(3) The child's rights to correspond by telephone with family members and friends;

(4) The child's rights to receive and give gifts to family, friends, employees, or other children in care, including any restrictions on gifts;

(5) Personal possessions a child is or is not allowed to have;

(6) Emergency behavior intervention techniques if the use of emergency behavior intervention is permitted in your operation. If its use is not permitted, you must have a policy disallowing its use;

(7) Discipline policies, including techniques and methods for ensuring the appropriateness of discipline techniques used with a child. These policies and procedures must:

(A) Guide employees in methods used for discipline of a child;

(B) Include measures for positive responses to appropriate behavior;

(C) Make clear that discipline of any type is inappropriate and not permitted for infants; and

(D) Emphasize the importance of nurturing behavior, stimulation, and promptly meeting the child's needs;

(8) Any religious program or activity that you offer and whether you require participation by children, if applicable;

(9) Transitional living policies, if you offer such a program;

(10) The plans for meeting the educational needs of each child, including your educational program and required participation by children, if applicable;

(11) When trips with caregivers away from the operation are allowed and what protocols will be used;

(12) Program expectations and rules that apply to all children;

(13) Child grievance procedures;

(14) The type and frequency of reports to parents;

(15) Procedures for routine and emergency diagnosis and treatment of medical and dental problems;

(16) Routine health care relating to pregnancy and childbirth, if you admit and/or care for a pregnant child; and

(17) Your plan for providing health-care services to a child with primary medical needs;

(18) If applicable, the policy required by §748.3931(3) of this title (relating to Are weapons, firearms, explosive materials, and projectiles permitted at my operation?); and

(19) Written plans and procedures for handling disasters and emergencies, such as fire, severe weather, and transportation emergencies. Employees must know the procedures for addressing disasters and emergencies including evacuation procedures, supervision of children, and contacting emergency help. The administrator or designee in charge of the operation must know what action to take in responding to a transportation emergency call. A copy of these plans and procedures must be available for our staff to review.

§748.237. What emergency behavior intervention policies must I develop if the use of emergency behavior intervention is permitted at my operation?

At a minimum, you must develop written emergency behavior intervention policies to implement the requirements in Subchapter N of this chapter (relating to Emergency Behavior Intervention). The policies must include the following:

(1) A complete description of emergency behavior interventions that you permit caregivers to use;

(2) The specific techniques that caregivers can use;

(3) The qualifications for caregivers who assume the responsibility for emergency behavior intervention implementation, including required experience and training, and an evaluation component for determining when a specific caregiver meets the requirements of a caregiver qualified in emergency behavior intervention. You must have an on-going program to evaluate caregivers qualified in emergency behavior intervention and the use of emergency behavior interventions;

(4) Your requirements for and restrictions on the use of permitted emergency behavior interventions;

(5) How you will meet the following requirements:

(A) Post the emergency behavior interventions that you allow in a place where the children and clients can view them, or at admission, provide the children and clients with a personal copy of the operation's emergency behavior intervention policies;

(B) During admission, explain and document the following to a child in a manner that the child can understand:

(i) Who can use emergency behavior intervention;

(ii) The actions a caregiver must first attempt to defuse the situation and avoid the use of emergency behavior intervention;

(iii) The situations in which emergency behavior intervention may be used;

(iv) The types of emergency behavior intervention you authorize;

(v) When the use of emergency behavior intervention must cease;

(vi) What action the child must exhibit to be released from emergency behavior intervention;

(vii) The way to report an inappropriate emergency behavior intervention;

(viii) The way to provide voluntary comments on any emergency behavior intervention; and

(ix) The process for making comments on any emergency behavior intervention, such as comments regarding the incident that led to the emergency behavior intervention, the manner in which a caregiver intervened, and the manner in which the child was the subject or to which he was a witness. You may create a standardized form that is easily accessible or give children the permission to submit comments on regular paper; and

(C) At admission, requirements for obtaining each child's input on preferred de-escalation techniques that caregivers can use to assist the child in the de-escalation process, and revisit this information with the child and caregivers during each post emergency behavior intervention discussion;

(6) Requirements that caregivers must attempt less restrictive and less intrusive emergency behavior interventions as preventive measures and de-escalating interventions to avoid the need for the use of emergency behavior intervention;

(7) Training for emergency behavior intervention. The policy must include a description of the emergency behavior intervention training curriculum that meets the requirements in the rules of this chapter, the amount and type of training required for different levels of caregivers (if applicable), training content, and how the training will be delivered; and

(8) Prohibitions for discharging or otherwise retaliating against:

(A) An employee, client, resident, or other person for filing a complaint, presenting a grievance, or otherwise providing in good faith information relating to the misuse of emergency behavior intervention at the operation; or

(B) A client or resident because someone on behalf of the client or resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of emergency behavior intervention at the operation.

§748.239. What policies must I develop if I use volunteers?

If you use volunteers, you must develop policies that:

(1) Include volunteer job descriptions and/or responsibilities;

(2) Address volunteer qualifications, screening and selection procedures, and orientation and training programs;

(3) Address supervision of volunteers; and

(4) Address visitation with children in care.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. REPORTS AND RECORD KEEPING

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

40 TAC §§748.301, 748.303, 748.305, 748.307, 748.309, 748.311, 748.313, 748.315

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and Texas Family Code, §261.410.

§748.303. When must I report and document a serious incident?

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified time frames:
Figure: 40 TAC §748.303(a)

(b) If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident. You do have to report the incident to law enforcement, as outlined in the chart above. You also have to report the incident to the parents, if the adult resident is not capable of making decisions about his own care.

(c) You must report and document the following types of serious incidents involving your operation, an employee, a professional level service provider, or a volunteer to the following entities within the specified time frame:
Figure: 40 TAC §748.303(c)

§748.307. When must I report other occurrences?

You must report and document the following occurrences to the following entities within the specified time frame:
Figure: 40 TAC §748.307

§748.309. How do I make a report of a serious incident or occurrence to Licensing?

(a) All serious incident reports must be made to the Child Abuse Hotline; and

(b) Occurrences that are required to be reported to Licensing in writing must be forwarded to your Licensing representative (See §748.307(2) and (3) of this title (relating to When must I report other occurrences?)).

§748.313. What additional documentation must I include with a written serious incident report?

You must include the following additional documentation with a written serious incident report, as applicable:
Figure: 40 TAC §748.313

§748.315. Where must I keep incident reports?

(a) You must keep the incident reports on file at the operation for two years.

(b) You must permit Licensing to make a copy of incident reports, as requested.

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DIVISION 2. OPERATION RECORDS

40 TAC §748.341

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 3. PERSONNEL RECORDS

40 TAC §748.361, §748.363

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.361. Where must I maintain personnel records?

(a) You must maintain active personnel records at the operation.

(b) You must maintain archived personnel records at the operation and/or in a designated location, as long as they are available for our review within 48 hours.

(c) You may archive entire closed personnel records electronically.

(d) Your system for maintaining all personnel records must be uniform throughout the operation.

(e) You must maintain a master list of active and archived personnel records and their location in the main office of the operation.

§748.363. What information must the personnel record of an employee include?

For each employee, the personnel record must include:

(1) Documentation showing the date of employment;

(2) Documentation showing how the person meets the minimum age and qualifications for the position;

(3) A current job description;

(4) Evidence of any valid professional licensures, certifications, or registrations the person must have to meet qualifications for the position, such as a current renewal card or a letter from the credentialing entity verifying that the person has met the required renewal criteria;

(5) A copy of the record of tuberculosis screening conducted prior to the person having contact with children in care showing that the employee is free of contagious tuberculosis as provided in §748.1583 of this title (relating to Who must have a tuberculosis (TB) examination?);

(6) A notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059;

(7) A statement signed and dated by the employee or caregiver that he has read a copy of the:

(A) Operational policies; and

(B) Personnel policies;

(8) A statement signed and dated by the employee or caregiver indicating that he must immediately report any suspected incident of child abuse, neglect, or exploitation to the Child Abuse Hotline and to the operation's administrator or administrator's designee;

(9) Proof of request for background checks;

(10) A copy of the valid driver's license for each person who transports a child;

(11) A record of training and training hours;

(12) Any documentation of the person's tenure with the operation; and

(13) The date and reason for the person's separation, if applicable.

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DIVISION 4. CHILD RECORDS

40 TAC §§748.391, 748.393, 748.395, 748.397, 748.399, 748.401

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.391. What is an active child record?

An active child record consists of the child's record for the most recent 12 months of service.

§748.393. How must I maintain an active child record?

(a) You must keep active child records at the operation where the child is receiving services.

(b) On an on-going basis, you must ensure that each child's record:

(1) Includes the child's full name and another method of identifying the child, such as a client number;

(2) Includes documentation of known allergies and chronic health conditions on the exterior of the child's record or in another place where the information is clearly visible to persons with access to the record;

(3) Includes the date of each data entry and the name of the employee who makes the data entry;

(4) Is kept accurate and current;

(5) Is locked and kept in a safe location; and

(6) Is kept confidential as required by law.

§748.395. How current must a child's record be?

All documentation must be in the record:

(1) No later than 30 days after the occurrence or event;

(2) Within 15 days from the end of the month for monthly summaries; or

(3) As otherwise specified in this chapter.

§748.397. Who must consent to the release of a child's record?

Unless you are releasing the record to the parents, to us, or as required by law, you may not release any portion of a child's record to any agency, organization, or individual without the written consent of the person legally authorized to consent to the release.

§748.401. How must I maintain a child's record that is not active?

These records must be available for our review within 48 hours. Otherwise, the records may be archived electronically or kept anywhere and in any manner, as long as they are safe from damage or destruction.

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DIVISION 5. RECORD RETENTION

40 TAC §§748.431, 748.433, 748.435

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The new sections implement HRC, §42.042.

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SUBCHAPTER E. PERSONNEL

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §§748.501, 748.503, 748.505, 748.507, 748.509

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.501. What must my written professional staffing plan include?

Your written and implemented professional staffing plan must:

(1) Demonstrate that the number, qualifications, and responsibilities of professional positions, including the child-care administrator, are appropriate for the size and scope of your services and that workloads are reasonable enough to meet the needs of the children in care;

(2) Describe in detail the qualifications, duties, responsibilities, and authority of professional positions. For each position, the plan must show whether employment is on a full-time, part-time, or continuing consultative basis. For part-time and consulting positions, the plan must specify the number of hours and/or frequency of services; and

(3) Document your staffing patterns, including your child/caregiver ratios, hours of coverage, and plans for providing backup caregivers in emergencies.

§748.505. What minimum qualifications must all employees meet?

(a) An employee's behavior or health status must not present a danger to children in care.

(b) Each employee who is regularly or frequently present while children are in care must:

(1) Meet the requirements in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(2) Have a record of a tuberculosis screening showing the employee is free of contagious TB as provided in §748.1583 of this title (relating to Who must have a tuberculosis (TB) examination);

(3) Be physically, mentally, and emotionally capable of performing assigned tasks and have the skills necessary to perform assigned tasks; and

(4) Complete a notarized Licensing *Affidavit for Applicants for Employment* form, as specified in Human Resources Code, §42.059.

§748.507. What general responsibilities do all employees have?

Regardless of whether the employee is counted in the child/caregiver ratio, each employee must:

(1) Demonstrate competency, prudent judgment, and self-control in the presence of children and when performing assigned responsibilities;

(2) Report suspected abuse, neglect, and exploitation to the Child Abuse Hotline and to the designated employee or administrator; and

(3) Know and comply with applicable rules of this chapter, Chapter 42 of the Human Resources Code, Chapter 745 of this title (relating to Licensing), and any other applicable laws.

§748.509. What are the requirements for tuberculosis screening?

Before having contact with children in care, all caregivers, employees, volunteers, and contract service providers must be screened for tuberculosis as provided in §748.1583 of this title (relating to Who must have a tuberculosis (TB) examination?).

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DIVISION 2. CHILD-CARE ADMINISTRATOR

40 TAC §§748.531, 748.533, 748.535, 748.537, 748.539

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.533. Can a child-care administrator be an administrator for two residential child-care operations?

(a) Except as provided in subsection (b) of this section, a child-care administrator can be an administrator for two residential child-care operations, including a child-placing agency, if:

(1) Both operations are in good standing with Licensing;

(2) The size and scope of the operations are manageable by one person, which is clarified in the written professional staffing plans;

(3) The child-placing agency, if applicable, is not managing more than 25 foster homes;

(4) The person also holds a valid Child-Placing Agency Administrator License, if applicable; and

(5) The general residential operations and/or RTCs are contiguous. A child-placing agency does not have to be contiguous.

(b) An operation that provides emergency care services must designate an employee in the staffing plan that is solely responsible for administering those services. This employee must have the experience and background to be able to perform the child-care administrator responsibilities. See §748.535 of this title (relating to What responsibilities must the child-care administrator designated to be responsible for the on-site administration of the operation have?).

(c) An operation that provides an assessment services program may designate their child-care administrator or another employee as the person responsible for administering those services. The person designated must:

(1) Be a Licensed Child-Care Administrator;

(2) Have a master's degree in social work or a human services field from an accredited college or university and at least two years of supervised child-placing experience. The degree must include:

(A) A minimum of nine credit hours in graduate level courses that focus on family and individual function and interaction; and

(B) At least 350 hours of formal, supervised field placement or practicum with a social service or human services agency; or

(3) Have a master's degree in a human services field and at least three years of supervised child-placing experience.

§748.537. What must the system for ensuring that an employee is available to handle emergencies include?

(a) A person designated to handle emergencies must be on call and accessible to your caregivers.

(b) You must inform all caregivers and us of the system and how to contact the person on call in case of an emergency.

(c) The employee is not required to be a Licensed Child-Care Administrator.

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DIVISION 3. PROFESSIONAL LEVEL SERVICE PROVIDERS

40 TAC §§748.561, 748.563, 748.565, 748.567, 748.569, 748.571, 748.573, 748.575

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.563. What professional qualifications must a professional level service provider have in order to perform professional level service activities?

(a) If you provide treatment services to 25 or more children with emotional disorders, or if more than 30% of the children in your care receive treatment services for emotional disorders, then a professional level service provider must have the following qualifications:
Figure: 40 TAC §748.563(a)

(b) To provide services for any other children, a professional level service provider must have the following qualifications:
Figure: 40 TAC §748.563(b)

(c) A person who is a professional level service provider at your operation on or before the effective date of these rules may have the following qualifications in lieu of those set forth in subsection (b) of this section.
Figure: 40 TAC §748.563(c)

§748.569. Must I have health care professionals on staff or on contract if I provide services to children with primary medical needs?

If you provide treatment services to 25 or more children with primary medical needs or if more than 30% of the children in your care receive treatment services for primary medical needs:

(1) You must have a licensed registered nurse on staff or on contract to respond to emergencies, questions, or other medical issues. A registered nurse must work during the day at the operation. A registered nurse in this position may be relieved on days off by a licensed registered nurse or by a licensed vocational nurse with appropriate supervision as defined in Tex. Occ. Code §301.353.

(2) You must arrange for:

(A) 24-hour availability of nursing, medical, and psychiatric services;

(B) Licensed nursing services, including 24-hour nursing direction or supervision;

(C) Assistance with mobility;

(D) Routine adjustments or replacement of medical equipment; and

(E) As needed, caregiver supervision of children during the provision of medical and dental services.

(3) You must ensure that a physician on staff or on contract recommends and approves services at each initial diagnosis and at each review.

§748.571. What are the responsibilities of a registered nurse at an operation that provides services to a child with primary medical needs?

The responsibilities of a registered nurse include:

(1) Performing a nursing assessment of the child to include documentation of the child's diagnosed medical needs and selection of placement;

(2) Leading the service planning process for the child's care including registered nurse delegation of tasks or exemption from the registered nurse delegation in compliance with 22 TAC, Chapters 224 and 225 of the Texas Board of Nurse Examiners rules;

(3) Directing the health care training of unlicensed caregivers, such as care of a permanently placed feeding tube;

(4) Ensuring non-mobile children are turned every two hours to increase circulation and to prevent bedsores or contractures, unless medical orders are to the contrary. This procedure must be documented in the child's record;

(5) Reviewing medical records;

(6) Contacting other professionals, as needed, for the child's care;

(7) On-site visits for nursing assessments and child record reviews, including compliance with written physician orders;

(8) Monitoring the implementation of the child's service plan; and

(9) Documenting outcomes for interventions used in the child's care.

§748.573. What are the requirements for other nursing personnel for an operation that provides treatment services to 25 or more children with primary medical needs, or for an operation in which more than 30% of the children in care receive treatment services for primary medical needs?

Your nursing personnel must:

(1) Be awake and available at the operation on a 24-hour basis;

(2) Be under the direction of a registered nurse who is licensed to practice in Texas; and

(3) Include a licensed vocational nurse or registered nurse.

§748.575. In what circumstances may a physician or registered nurse (including an advanced practice registered nurse) delegate nursing tasks to unlicensed caregivers?

The physician or registered nurse may delegate nursing tasks to unlicensed caregivers only if all delegation criteria are met for the task to be delegated, including, but not limited to:

(1) Compliance with 22 TAC, Chapters 224 and 225 of the Texas Board of Nurse Examiners rules;

(2) The nursing task is one that a reasonable and prudent physician or registered nurse would find is within the scope of sound nursing judgment to delegate;

(3) The physician or registered nurse determines that the nursing task can be properly and safely performed by the unlicensed caregiver without jeopardizing the child's welfare;

(4) The operation employing or contracting with the unlicensed caregivers develops and follows a protocol, with input from a physician or registered nurse, for the instruction and training of unlicensed caregivers performing nursing tasks. The protocol must address:

(A) An established mechanism for identifying those individuals to whom nursing tasks may be designated;

(B) The manner in which the instruction addresses the complexity of the delegated task;

(C) The manner in which the unlicensed caregivers demonstrate the competency of the delegated task; and

(D) The mechanism for re-evaluation of the competency;

(5) The training protocol recognizes that the final decision as to what nursing tasks can be safely delegated in any specific situation is within the specific scope of the physician's or registered nurse's judgment; and

(6) A physician or registered nurse must instruct unlicensed caregivers in performing nursing tasks.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. TREATMENT DIRECTOR

40 TAC §§748.601, 748.603, 748.605, 748.607

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. CAREGIVERS

40 TAC §§748.681, 748.683, 748.685

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.685. What responsibilities does a caregiver have when supervising a child or children?

(a) The caregiver is responsible for:

(1) Knowing which children they are responsible for;

(2) Child care services for each assigned child;

(3) Being aware of and accountable for each child's on-going activity;

(4) Providing the level of supervision necessary to ensure each child's safety and well being, including auditory and/or visual awareness of each child's on-going activity as appropriate; and

(5) Being able to intervene when necessary to ensure each child's safety.

(b) In deciding how closely to supervise a child, the caregiver must take into account:

(1) The child's age;

(2) The child's individual differences and abilities;

(3) The indoor and outdoor layout of the operation;

(4) Surrounding circumstances, hazards, and risks; and

(5) The child's physical, mental, emotional, and social needs.

(c) Caregivers must:

(1) Be aware of the children's habits, interests, and any special needs;

(2) Provide a safe environment;

(3) Cultivate developmentally appropriate independence in children through planned but flexible program activities;

(4) Positively reinforce children's efforts and accomplishments;

(5) Ensure continuity of care for children by sharing with incoming caregivers information about each child's activities during the previous shift and any verbal or written information or instructions given by the parent or other professionals; and

(6) Implement and follow the children's service plans.

(d) Caregivers that supervise a child receiving treatment services for an emotional disorder must maintain daily progress notes for the child. Caregivers must sign and date each progress note at the time the progress note is completed.

(e) If a child or children are allowed overnight visits with staff, the child(ren) must be properly fed, lodged, and supervised, and their health, safety, and well-being protected. The person(s) responsible for the child(ren) must be given information about obtaining emergency medical care.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. CONTRACT STAFF AND VOLUNTEERS

40 TAC §§748.721, 748.723, 748.725, 748.727, 748.729, 748.731

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.721. What are the requirements for a volunteer?

(a) You must maintain a personnel record for each volunteer.

(b) The personnel record must include a statement signed and dated by the volunteer indicating he must immediately report any suspected incident of abuse, neglect, or exploitation to the Child Abuse Hotline and the operation's administrator or administrator's designee.

(c) If the volunteer provides short-term services through an agency or an organization, you must determine that the organization or agency's policies meet the intent of these rules before the volunteer can have contact with children.

§748.723. Are there additional requirements for a volunteer or contractor that performs employee functions?

(a) A volunteer or contractor that performs any employee function must meet the same requirements as an employee who performs that function.

(b) You must maintain records documenting how these requirements are met.

§748.731. Can I use a volunteer that is on probation, parole, or referred for community service through the courts?

No, a person that is not being compensated may not provide services to an operation, if that person is on probation or parole, or is referred for community services through the courts because of criminal activity, including as an alternative to incarceration. This prohibition applies even if the services do not involve contact with children in care.

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SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT
DIVISION 1. DEFINITIONS

40 TAC §748.801

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.801. What do certain words mean in this subchapter?

These words have the following meanings in this subchapter:

(1) CEU--Continuing education unit.

(2) CPR--Cardiopulmonary resuscitation.

(3) Hours--Clock hours.

(4) Instructor led training--Training that is characterized by the communication and interaction that takes place between the student and the instructor and must include an opportunity for the student to timely interact with the instructor to obtain clarifications and information beyond the scope of the training materials, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include classroom training,

on-line distance learning, video-conferencing, or other group learning experiences.

(5) Self instructional training--Training that is designed to be used by one individual working alone at his own pace to complete lessons or modules. Examples of this type of training include computer based training, written materials, or video training.

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DIVISION 2. ORIENTATION

40 TAC §748.831, §748.833

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 3. PRE-SERVICE EXPERIENCE AND TRAINING

40 TAC §§748.861, 748.863, 748.865, 748.867, 748.869

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.863. What are the pre-service hourly training requirements for caregivers and employees?

(a) Caregivers and certain employees must complete the following training hours before the noted time frame:
Figure: 40 TAC §748.863(a)

(b) You must document the completion of each training requirement in the appropriate personnel record.

§748.867. Must I provide pre-service training to a caregiver or an employee who has previously worked in an operation?

(a) A caregiver is exempt from completing the eight hours of general pre-service training if he has been employed as a caregiver in a general residential operation or residential treatment center during the past 12 months.

(b) A caregiver or an employee working with children does not have to complete the pre-service training regarding emergency behavior intervention if he:

(1) Has been employed in a general residential operation or residential treatment center during the past 12 months;

(2) Has received training during the past 12 months in the types of emergency behavior intervention used at your operation; and

(3) Can demonstrate knowledge and competency of the training material both in writing and in physical techniques.

(c) You must document the exemption factors in the appropriate personnel record.

§748.869. What are the instructor requirements for providing pre-service training?

(a) A qualified instructor must deliver the pre-service training.

(b) The training must be instructor led.

(c) A health-care professional or a pharmacist must provide training in administering psychotropic medication. The trainer must assess each participant after the training to ensure that the participant has learned the course content.

(d) To provide training in emergency behavior intervention the:

(1) Instructor must be certified in a recognized method of emergency behavior intervention, or be able to document knowledge of:

(A) The emergency behavior intervention;

(B) The course material;

(C) Training delivery methods and techniques; and

(D) Training evaluation or assessment methods and techniques; and

(2) Training must be competency-based and require participants to demonstrate skill and competency at the end of the training.

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DIVISION 4. GENERAL PRE-SERVICE TRAINING

40 TAC §§748.881, 748.883, 748.885

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.881. What curriculum components must be included in the general pre-service training?

The general pre-service training curriculum must include the following components:

(1) Topics appropriate to the needs of children for whom the caregiver will be providing care, such as developmental stages of children, fostering children's self-esteem, constructive guidance and discipline of children, strategies and techniques for monitoring and working with these children, and age-appropriate activities for the children;

(2) Measures to prevent, identify, treat, and report suspected occurrences of child abuse (including sexual abuse), neglect, and exploitation;

(3) Procedures to follow in emergencies, such as weather-related emergencies, volatile persons, and severe injury or illness of a child or adult;

(4) Preventing the spread of communicable diseases; and

(5) The location and use of fire extinguishers and first-aid equipment.

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DIVISION 5. PRE-SERVICE TRAINING REGARDING EMERGENCY BEHAVIOR INTERVENTION

40 TAC §748.901, §748.903

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.903. If I allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

(a) If you allow the use of emergency behavior intervention, at least 75% of the required hours of pre-service training regarding emergency behavior intervention must focus on early identification of potential problem behaviors and strategies and techniques of less restrictive interventions, including the components listed in §748.901 of this title (relating to If I do not allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?).

(b) The training does not have to address the use of any emergency behavior intervention that your policies do not allow.

(c) The other four hours of the pre-service training curriculum regarding emergency behavior intervention must include the following components:

(1) Different roles and responsibilities of caregivers qualified in emergency behavior intervention versus employees or volunteers who are not qualified in emergency behavior intervention;

(2) Escape and evasion techniques to prevent harm to the child and caregiver without requiring the use of an emergency behavior intervention;

(3) Safe implementation of the restraints and/or seclusion techniques and procedures that are appropriate for the age and weight of children served and permitted by the rules in this chapter and your policies and procedures;

(4) The physiological impact of emergency behavior intervention;

(5) The psychological impact of emergency behavior intervention, such as flashbacks from prior abuse;

(6) How to adequately monitor the child during the administration of an emergency behavior intervention to prevent injury or death;

(7) Monitoring physical signs of distress and obtaining medical assistance;

(8) Health risks for children associated with the use of specific techniques and procedures;

(9) Drawings, photographs, or videos of each personal or mechanical restraint permitted by your policy. For mechanical restraints, this must include the manufacturer's complete specifications for each device permitted, an explanation of modifications to the manufacturer's specifications, and a copy of the approval of the modification from a licensed psychiatrist; and

(10) Strategies for re-integration of children into the environment after the use of emergency behavior intervention, including the debriefing of caregivers and the child.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. ANNUAL TRAINING

40 TAC §§748.931, 748.935, 748.937, 748.939, 748.941, 748.943, 748.945, 748.947, 748.949

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.931. What are the annual training requirements for caregivers and employees?

Caregivers and certain employees must complete the following training hours:
Figure: 40 TAC §748.931

§748.935. When must a person complete the annual training?

(a) Each person must complete the annual training:

(1) Within 12 months from the date of his employment; and

(2) During each subsequent 12-month period.

(b) You have the option of prorating the person's annual training requirements from the date of employment to the end of the calendar year or the end of the agency's fiscal year and then beginning a new 12-month period that coincides with the calendar or fiscal year.

§748.937. What types of hours or instruction can be used to complete the annual training requirements?

(a) If the training complies with the other rules in this division (relating to Annual Training), annual training may include hours or CEUs earned through:

(1) Workshops or courses offered by local school districts, colleges or universities, or Licensing;

(2) Conferences or seminars;

(3) Self-instructional training, excluding training on emergency behavior intervention, first-aid, and CPR;

(4) Planned learning opportunities provided by child-care associations or Licensing;

(5) Planned learning opportunities provided by a professional contract service provider, child-care administrator, professional level service provider, treatment director, or caregiver who meets minimum qualifications in the rules of this chapter; or

(6) The hours attending college or a professional credentialing or registry program.

(b) For annual training hours, you may count:

(1) The hours of annual training that a person received at another general residential operation or residential treatment center, if the person:

(A) Received the training within the time period you are using to calculate the person's annual training; and

(B) Provides documentation of the training;

(2) Annual emergency behavior intervention training;

(3) First-aid and CPR training;

(4) The hours of pre-service training that the person earns in addition to the required pre-service hours. For example, if a person completes 24 hours of pre-service emergency behavior intervention training, and is required to obtain 16 hours, that person may count eight of the hours toward annual training requirements;

(5) Half of the hours spent developing initial training curriculum that is relevant to the population of children served. No additional credit hours for training curriculum development are permitted for repeated training sessions; and

(6) One-fourth of the hours spent updating and making revisions to training curriculum that is relevant to the population of children served.

(c) For annual training hours, you may not count:

(1) Orientation training;

(2) Pre-service training;

(3) The hours involved in case staffings and conferences with the supervisor; or

(4) The hours presenting training to others.

(d) No more than one-third of the required annual training hours may come from self-instructional training.

(e) If a person earns more than the minimum number of training hours required during a particular year, the person can carry over to the next year a maximum of 10 training hours.

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DIVISION 7. FIRST-AID AND CPR CERTIFICATION

40 TAC §§748.981, 748.983, 748.985, 748.987, 748.989

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.987. What must the first-aid and CPR training include?

(a) First-aid and CPR training and re-certification must consist of a curriculum that includes both written and hands-on skill-based instruction, practice (for CPR, the practice is through the use of a CPR mannequin), and testing.

(b) CPR training and recertification must include CPR for children and adults. For operations that care for infants and/or admit children with infants, the training must also include CPR for infants.

§748.989. What documentation must I maintain for first-aid and CPR certification?

(a) You must document the completion of each training requirement in the appropriate personnel records. The documentation may be a certificate, letter, or a statement of successful completion, that is signed and dated, from the training source. A photocopy of the original first-aid and/or CPR certificate or letter may be maintained in the personnel record, as long as the employee can provide an original document upon request by Licensing.

(b) The documentation must include the following information:

(1) The participant's name;

(2) Date of the training;

(3) Title or subject of the training;

(4) The trainer's name and qualifications;

(5) The expiration date of the certification as determined by the organization providing the certification; and

(6) Length of the training in hours.

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SUBCHAPTER G. CHILD/CAREGIVER RATIOS

40 TAC §§748.1001, 748.1003, 748.1005, 748.1007, 748.1009, 748.1011, 748.1013, 748.1015, 748.1017, 748.1019, 748.1021, 748.1023

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The new sections implement HRC, §42.042.

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SUBCHAPTER H. CHILD RIGHTS

40 TAC §§748.1101, 748.1103, 748.1105, 748.1107, 748.1109, 748.1111, 748.1113, 748.1115, 748.1117, 748.1119

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1101. What rights does a child in care have?

(a) A child's rights are cumulative of any other rights granted by law or other Licensing rules.

(b) You must adhere to the child's rights, including:

(1) The right to appropriate care and treatment in the least restrictive setting available that can meet the child's needs;

(2) The right to be free from discrimination on the basis of gender (if your operation accepts both genders), race, religion, national origin, or sexual orientation;

(3) The right to have physical, emotional, developmental, educational, social, and religious needs met;

(4) The right to be free of abuse, neglect, and exploitation as defined in Texas Family Code, §261.401;

(5) The right to be free from any harsh, cruel, unusual, unnecessary, demeaning, or humiliating punishment, which includes:

(A) Shaking the child;

(B) Subjecting the child to corporal punishment;

(C) Threatening the child with corporal punishment;

(D) Any unproductive work that serves no purpose except to demean the child, such as moving rocks from one pile to another or digging a hole and then filling it in;

(E) Denying the child food, sleep, toileting facilities, mail, or family visits as punishment;

(F) Subjecting the child to remarks that belittle or ridicule the child or the child's family; and

(G) Threatening the child with the loss of placement or shelter as punishment;

(6) The right to discipline that is appropriate to the child's age and developmental level;

(7) The right to have restrictions or disciplinary consequences explained when the measures are imposed;

(8) The right to a humane environment, including any treatment environment that provides reasonable protection from harm and appropriate privacy for personal needs;

(9) The right to receive educational services appropriate to the child's age and developmental level;

(10) The right to training in personal care, hygiene, and grooming;

(11) The right to reasonable opportunities to participate in community functions, including recreational and social activities such as Little League teams, Girl Scouts and Boy Scouts, and extracurricular school activities outside of the operation, if appropriate;

(12) The right to have adequate personal clothing, which must be suitable to the child's age and size and comparable to the clothing of other children in the community;

(13) The right to have personal possessions at the child's placement and to acquire additional possessions within reasonable limits;

(14) The right to be provided with adequate protective clothing against natural elements such as rain, snow, wind, cold, sun, and insects;

(15) The right to maintain regular contact with family members unless the child's best interest, appropriate professionals, or court necessitates restrictions;

(16) The right to send and receive uncensored mail, to have telephone conversations, and to have visitors, unless the child's best interest, appropriate professionals, or court order necessitates restrictions;

(17) The right to hire independent mental health-care professionals, medical professionals, and attorneys at the child's own expense;

(18) The right to be compensated for any work done for the operation as part of the child's service plan or vocational training, with the exception of assigned routine duties that relate to the child's living environment, such as cleaning his room or other chores, or work assigned as a disciplinary measure;

(19) The right to have personal earnings, allowances, possessions, and gifts as the child's personal property;

(20) The right to be able to communicate in a language or any other means that is understandable to the child at admission or within a reasonable time after an emergency admission of a child, if applicable, such as having a plan for an interpreter, having at least one person at the operation at all times who can communicate with the child in the child's own language, or other means to communicate with the child in the child's own language;

(21) The right to confidential care and treatment;

(22) The right to consent in writing before performing any publicity or fund raising activity for the operation, including the use of his photograph;

(23) The right not to be required to make public statements acknowledging his gratitude to the operation;

(24) The right not to receive unnecessary or excessive medication;

(25) The right to have a comprehensive service plan that addresses the child's needs, including transitional and discharge planning;

(26) The right to participate in the development and review of the child's service plan within the limits of the child's comprehension and ability to manage the information;

(27) The right to receive emotional, mental health, or chemical dependency treatment separate from adults (other than young adults) who are receiving services;

(28) The right to receive appropriate treatment for physical problems that affect the child's treatment or safety; and

(29) The right to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation.

§748.1103. How must I inform a child and the child's parents of their rights?

(a) Within seven days after you admit a child into your operation, you must review the child's rights with the child and a child's parent, unless the parent's consent is not required. You must also provide the child and a child's parent with a written copy of the child's rights.

(b) Child rights must be written in:

(1) Simple, non-technical terms; and

(2) English, unless the person does not understand English. The child's rights must be written in the person's primary language, if possible.

(c) If the person you are informing has a visual or auditory impairment, you must explain the child's rights in a manner that is understandable to the person.

(d) The person you are informing of the child's rights must sign a statement indicating that the person has read and understands these rights. You must put the signed copy in the child's record.

§748.1105. What provisions must I make for a child's personal care?

You must provide the child with:

(1) Reasonable opportunities to select his clothing as outlined in your policies; and

(2) Appropriate equipment and supplies for personal care, hygiene, and grooming.

§748.1107. What right does a child have regarding contact with his parent(s)?

(a) You must allow contact between a child and his parent(s) whose parental rights have not been terminated according to:

(1) Your policies; and

(2) The provisions of a court order or any visitation agreements.

(b) You must document in the child's record:

(1) Any plans for contact between the child and a parent; and

(2) Any decision to limit contact with a parent.

(c) Before the service planning team, treatment director, or professional level service provider can temporarily restrict ongoing contacts or communication between the child and a parent, you must:

(1) Explain the reasons for the restrictions to the child and the child's parent; and

(2) Document the reasons in the child's record.

(d) Restrictions imposed by you that continue for more than 30 days must be re-evaluated monthly by a professional level service provider, who also must:

(1) Explain the reasons for the continued restrictions to the child and the child's parents; and

(2) Document the reasons in the child's record.

(e) If you limit communications or visits with a parent for practical reasons, such as geographical distance or expense, you must discuss the limits with the child and the child's parents. You must document the limits in the child's record.

§748.1109. What right does a child have regarding contact with siblings?

(a) A child must have a reasonable opportunity for sibling visits and contacts in an effort to preserve sibling relationships.

(b) You must address plans for sibling visits and contacts in the child's record.

(c) When contact is restricted or not allowed, you must include justification in the service plan and service plan reviews and updates. If a restriction imposed by you lasts more than 90 days, you must document the justification for continuing the restriction in the child's record at least every 90 days.

(d) If barriers to visits exist, such as unavoidable geographic distance and expense issues, the operation must make provisions for sibling contact through letters, telephone calls, or some other means.

§748.1111. What right to privacy does a child have in his contact with others?

(a) Except as determined by the child's service planning team, treatment director, professional level service provider, or parent, you may not:

(1) Open or read the child's incoming or outgoing mail, including electronic mail, unless necessary to assist the child with reading or writing; or

(2) Listen to or screen the child's telephone calls unless the child needs assistance with using the telephone.

(b) You must document in the child's record:

(1) Any reason for restricting the child's mail or telephone calls; and

(2) A list of the mail or telephone calls that you restrict.

(c) You must inform the child and his parent about restrictions you place on the child.

(d) Restrictions that continue for more than 30 days must be re-evaluated monthly by a professional level service provider, who also must:

(1) Explain the reasons for the continued restrictions to the child; and

(2) Document the reasons in the child's record.

§748.1113. Under what circumstances may I conduct a search for prohibited items or items that endanger a child's safety?

(a) A child's possessions must be free of unreasonable searches and unreasonable removal of personal items.

(b) You may search a child, his possessions, or his room only when you have reasonable suspicion:

(1) Of the presence of a prohibited item or an item that endangers the child's safety;

(2) That the child made suicidal threats or threatened to hurt himself or others; or

(3) That the child was involved in theft.

(c) Only a caregiver of the same gender as the child may conduct a search that involves the removal of clothing, other than outer clothing, such as coats, jackets, hats, gloves, shoes, or socks.

(d) If a search involves the removal of clothing (other than outer clothing), a second caregiver must witness the search.

(e) The caregiver must ensure that other children do not witness a search that involves the removal of clothing, other than outer clothing.

§748.1117. What must I document regarding a search?

You must document the following in the child's record when you conduct a search under §748.1113 of this title (relating to Under what circumstances may I conduct a search for prohibited items or items that endanger a child's safety?):

(1) The date of the search;

(2) The name of the child;

(3) Reason for the search;

(4) A description of what you searched;

(5) The clothing removed, if applicable;

(6) The name of the caregivers conducting the search;

(7) The name of the witness, if applicable;

(8) The results of the search; and

(9) The resolution of the issue with the child, including increased supervision, additional therapy, or disciplinary consequences.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. ADMISSION, SERVICE PLANNING, AND DISCHARGE

DIVISION 1. ADMISSION

40 TAC §§748.1201, 748.1203, 748.1205, 748.1207, 748.1209, 748.1211, 748.1213, 748.1215, 748.1217, 748.1219, 748.1221, 748.1223, 748.1225, 748.1227

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1201. May children receiving different types of service live in the same living quarters?

(a) Except as provided by subsection (c) of this section, children receiving different types of service may reside in the same living quarters as long as:

(1) A professional level service provider completes an evaluation of the living quarters for each child that you place in the living quarters; and

(2) In each evaluation, the professional level service provider ensures that:

(A) There is no conflict of care with the best interests of any of the children placed in the living quarters;

(B) Placing the child with different service or treatment needs in the living quarters will not adversely impact the other children in the living quarters;

(C) The number of children in the living quarters is appropriate at all times based on the needs of all children in the living quarters;

(D) Caregivers can appropriately supervise all children in the living quarters at all times; and

(E) You can meet the needs of all children in the living quarters.

(b) If the treatment or service needs of any children in the living quarters changes, the professional level service provider must evaluate the needs of each child in the living quarters to ensure there is no conflict of care.

(c) Children admitted for emergency care services must have separate living quarters, such as a separate wing of an operation, or a separate cottage. Children admitted for emergency care services must not be combined with children in non-emergency care for routine and daily activities, except children receiving regulated respite child-care services.

§748.1203. What children may I admit?

(a) You may only admit children who meet your admission policy guidelines and whose needs you can meet. If you adopt a change in your admission policies that requires a change in the conditions of your permit, you must request an amendment to your permit with us. You can only accept:

(1) The maximum number of children specified on your permit;

(2) Children whose age and gender are specified on your permit; and

(3) Children needing the types of services that are specified on your permit.

(b) Each placement must meet the child's physical, medical, recreational, educational, and emotional needs as identified in the child's admission assessment.

§748.1205. What information must I document in the child's record at admission?

(a) You must include the following in the child's record at admission:

(1) The child's name, gender, race, religion, date of birth, and birthplace;

(2) Court orders establishing who is the managing conservator for the child, if applicable;

(3) The name, address, and telephone number of the managing conservator, the primary caregivers for the child, any person with whom the child is allowed to leave the operation, and any other individual who has the legal authority to consent to the child's medical care;

(4) The names, addresses, and telephone numbers of biological or adoptive parents, unless parental rights have been terminated;

(5) The names, addresses, and telephone numbers of siblings;

(6) The date of admission;

(7) Medication the child is taking;

(8) The child's immunization record;

(9) Allergies, such as food, medication, sting, and skin allergies;

(10) Chronic health conditions, such as asthma or diabetes;

(11) Known contraindications to the use of restraint;

(12) Identification of the child's treatment needs, if applicable, and any additional treatment services or programmatic services the child is receiving; and

(13) A copy of the placement agreement, if applicable.

(b) If you admit a child for emergency care services, you must document the information:

(1) Regarding immediate danger in the child's record upon admission; and

(2) In subsection (a) of this section within 72 hours after you admit the child. If any information is not available within that time frame, you must document in the child's record reasonable efforts made to obtain the information.

(c) For emergency admissions, as opposed to a child receiving emergency care services, you must meet the requirements in Division 2 of this subchapter (relating to Emergency Admission).

§748.1209. What orientation must I provide a child?

(a) Within seven days of admission, you must provide orientation to each newly admitted child who is not an infant or a toddler. You must gear orientation to the intellectual level of the child.

(b) For a child functioning at a school age level, orientation must include information about your policies on the following:

(1) Visitation, including family visitation and overnight visitation;

(2) Mail;

(3) Telephone calls;

(4) Gifts;

(5) Personal possessions, including any limits placed on the possessions the child may or may not have;

(6) Emergency behavior intervention, including your policies and practices on the use of personal restraint;

(7) Discipline;

(8) The religious program and practices;

(9) The educational program;

(10) Trips away from the operation;

(11) Program expectations and rules; and

(12) Grievance procedures.

(c) For a child functioning above toddler age and below school age, orientation must include as many of the items in subsection (b) of this section as possible.

(d) You must document in the child's record when the orientation occurred, any items that the orientation did not include, and the reason that the orientation did not include that item.

§748.1211. What information must I share with the parent at the time of placement?

(a) The parent must be able to determine whether your program and/or practices are appropriate for the child and can meet the child's needs.

(b) At admission, you must review and provide written materials to the parent placing the child that explain:

(1) Information about the policies that you would present a child during orientation;

(2) Your policies regarding the:

(A) Use of volunteers or sponsoring families;

(B) Type and frequency of notifications made to parents; and

(C) Involvement of the child in any publicity and/or fund raising activity for the operation; and

(3) The parent's right to refuse to or withdraw consent for a child to participate in:

(A) Research programs; and/or

(B) Publicity and/or fund raising activities for the operation.

§748.1213. What information must I provide caregivers when I admit a child?

(a) By the day you admit the child for care, you must provide caregivers responsible for the child's care with information about the child's immediate needs such as enrolling the child in school or obtaining needed medical care or clothing.

(b) You must inform appropriate caregivers of any special needs, such as medical or dietary needs or conditions.

§748.1215. When must I complete the admission assessment?

(a) You must complete a non-emergency admission assessment according to the time frames required in §748.1217 of this title (relating to What information must an admission assessment include?). For an emergency admission assessment, see §748.1269 of this title (relating to For an emergency admission, when must I complete all of the requirements of an admission assessment?).

(b) A professional level service provider must sign and date each assessment, which must be in the child's record.

§748.1217. What information must an admission assessment include?

(a) An admission assessment must provide an initial evaluation of the appropriate placement for a child and ensure that you obtain the information necessary for you to facilitate service planning.

(b) Prior to a child's non-emergency admission, an admission assessment must be completed which includes:

(1) The child's legal status;

(2) A description of the circumstances that led to the child's referral for substitute care;

(3) A description of the child's behavior, including appropriate and maladaptive behavior, and any high-risk behavior posing a risk to self or others;

(4) Any history of physical, sexual, or emotional abuse or neglect;

(5) Current medical and dental status, including the available results of any medical and dental examinations;

(6) Current mental health and substance abuse status, including available results of any psychological or psychiatric examination;

(7) The child's current developmental level of functioning;

(8) The child's current educational level and any school problems;

(9) Any applicable requirements of §748.1219 of this title (relating to What are the additional admission requirements when I admit a child for treatment services?);

(10) Documentation indicating efforts made to obtain any of the information in paragraphs (1) - (9) of this subsection, if any information is not obtainable;

(11) The services you plan to provide to the child;

(12) Immediate goals of placement;

(13) The parent's expectations for placement, duration of the placement, and family involvement;

(14) The child's understanding of the placement;

(15) A determination of whether you can meet the immediate needs of the child; and

(16) A rationale for the appropriateness of the admission.

(c) Prior to completing a child's initial service plan, the following information must be added to the admission assessment:

(1) The child's social history. The history must include information about past and existing relationships with the child's birth parents, siblings, extended family members, and other significant adults and children, and the quality of those relationships with the child;

(2) A description of the child's home environment and family functioning;

(3) The child's birth and neonatal history;

(4) The child's developmental history;

(5) The child's mental health and substance abuse history;

(6) The child's school history, including the names of previous schools attended and the dates the schools were attended, grades earned, and special achievements;

(7) The child's history of any other placements outside the child's home, including the admission and discharge dates and reasons for placement;

(8) The child's criminal history, if applicable;

(9) The child's skills and special interests;

(10) Documentation indicating efforts made to obtain any of the information in paragraphs (1) - (9) of this subsection, if any information is not obtainable;

(11) The services you plan to provide to the child, including long-range goals of placement;

(12) Recommendations for any further assessments and testing;

(13) A recommended behavior management plan;

(14) A determination of whether you can meet the needs of the child, based on an evaluation of the child's special strengths and needs; and

(15) A rationale for the appropriateness of the admission.

(d) You must attempt to obtain a signed authorization, so you can subsequently request in writing materials from the child's current or most recent placement, such as the admission assessment, professional assessments, and the discharge summary. You must consider information from these materials when you complete your admission assessment if they are made available to you.

(e) This rule does not apply to children receiving emergency care services. See §748.4231 of this title (relating to What information must an admission assessment include for a child needing emergency care services?).

§748.1219. What are the additional admission requirements when I admit a child for treatment services?

When you admit a child for treatment services, you must do the following, as applicable:

Figure: 40 TAC §748.1219

§748.1221. What must I do if I cannot obtain the required information for an admission assessment?

(a) You must make reasonable efforts to obtain all required information.

(b) If you and the child's parent determine that attempting to get information at the time of placement would not be in the child's best interests, you may postpone attempting to acquire the information.

(c) In the child's admission assessment, you must document why a:

(1) Particular piece of information is unavailable; or

(2) Delay in obtaining a piece of information is necessary, including efforts made to obtain the information.

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DIVISION 2. EMERGENCY ADMISSION

40 TAC §§748.1261, 748.1263, 748.1265, 748.1269, 748.1271

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1263. What constitutes an emergency admission to my operation?

You may admit a child on an emergency basis if the child:

(1) Is being removed from a situation involving alleged abuse or neglect;

(2) Is an alleged perpetrator of abuse and cannot be served in the child's current placement due to his perpetrating behaviors;

(3) Displays behavior that is an immediate danger to himself or others and cannot function or be served in his current setting;

(4) Is abandoned and after exercising reasonable efforts, the child's identity cannot be immediately determined. The efforts made to obtain information on the child's identity must be documented in the child's record;

(5) Is removed from his home or placement, and there is an immediate need to find a residence for the child;

(6) Is released to your authorized emergency care program by a law enforcement or juvenile probation officer; or

(7) Is without adult care.

§748.1265. May I take possession of a child through a law enforcement or juvenile probation officer?

You may take possession of a child from a law enforcement or juvenile probation officer only if you meet the requirements of Division 7, Subchapter H of Chapter 745 of this title (relating to Taking Possession of a Child Through Law Enforcement or a Juvenile Probation Officer).

§748.1269. For an emergency admission, when must I complete all of the requirements for an admission assessment?

(a) For an emergency admission, you must complete all of the requirements (see Division 1 of this subchapter (relating to Admission)) for an admission assessment within 40 days from the date of the child's admission.

(b) In an emergency admission of a child receiving treatment services, the child must not continue in care for more than 30 days after the date of admission or 10 days after the date of admission for a residential treatment center, unless the child has received the psychological, psychiatric, psychometric, or physician's evaluation that is required by §748.1219 of this title (relating to What are the additional admission requirements when I admit a child for treatment services?), and the evaluation indicates manifestations of the disorder requiring treatment services. All evaluations must be signed, dated, and documented in the child's record.

§748.1271. At the time of an emergency admission, what information must I document in the child's record at admission?

At the time of the emergency admission you must document in the child's record:

(1) A brief description of the circumstances necessitating the emergency admission;

(2) The date of admission;

(3) Any allergies, such as food, medication, sting, and skin allergies;

(4) Any chronic health conditions, such as asthma or diabetes;

(5) Known contraindications to the use of restraint; and

(6) For the purpose of providing treatment services:

(A) A brief description of the child's history;

(B) The child's current behavior; and

(C) Your evaluation of how the placement will meet the child's needs and best interests.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. EDUCATIONAL SERVICES

40 TAC §§748.1301, 748.1303, 748.1305

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1301. What responsibilities do I have for the education of a child in care?

(a) You must arrange an appropriate education for each child, including:

(1) Ensuring the child in care attends an educational facility or program that is approved or accredited by the Texas Education Agency, the Southern Association of Colleges and Schools, the Texas Private School Accreditation Commission or by the out-of-state school district funding the child;

(2) Ensuring a school-age child has the training and education in the least restrictive setting necessary to meet the child's needs and abilities;

(3) Ensuring a child in care attends an educational facility or program that implements a special education student's individual education plan (IEP); and

(4) Advocating that a school-age child receives the educational and related services to which he is entitled under provisions of federal and state law and regulations.

(b) For children receiving treatment services you must designate a liaison between the agency and the child's school.

§748.1303. What responsibilities do I have for a child's individual educational needs?

You must:

(1) Review report cards and other information received from teachers or school authorities with the child and provide necessary information to caregivers;

(2) Counsel and assist the child regarding adequate classroom performance;

(3) Permit, encourage, and make reasonable efforts to involve the child in extracurricular activities to the extent of the child's interests and abilities and in accordance with the child's service plan;

(4) Provide a quiet, well-lighted space for the child to study and allow regular times for homework and study;

(5) Know what emergency behavior interventions are permitted and being used with the child;

(6) Request IEP meetings if concerned with the child's educational program or if the child does not appear to be making progress; and

(7) Attend IEP meetings and other school staffings and conferences to represent the child's educational best interests, including the child being evaluated for and provided with related services needed to benefit from educational services, and positive behavior supports designed to decrease the need for negative disciplinary techniques or interventions.

§748.1305. If I have an educational program, what information must I provide to a child's parent about that program?

If you have an educational program, you must include the following information in the discussion and in the written material you give to parents when you admit the child:

(1) The name of any educational program operated on the premises of your operation;

(2) Whether the program is accredited;

(3) Whether the Texas Education Agency has approved the program;

(4) Whether the educational course work is transferable to public schools; and

(5) The credentials of the teachers, if the teachers are not approved and regulated by the State Board of Educator Certification (SBEC).

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DIVISION 4. SERVICE PLANS

40 TAC §§748.1331, 748.1333, 748.1335, 748.1337, 748,1339, 748.1341, 748.1343, 748.1345, 748.1347, 748.1349, 748.1351

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1331. What are the requirements for a preliminary service plan?

(a) You must complete a preliminary service plan that addresses the immediate needs of a child, such as enrolling the child in school or obtaining needed medical care or clothing, within 72 hours of the child's admission.

(b) In addition, for a child receiving treatment services the preliminary service plan must include:

(1) A description of the child's immediate treatment and care needs;

(2) A description of the child's immediate educational, medical, and dental needs, including possible side effects of medications or treatment prescribed to the child;

(3) A description of how you will meet the child's needs, including any necessary increased supervision or follow-up actions of possible side effects of medication or treatment provided to the child;

(4) The identification of any issues or concerns the child may have that could escalate a child's behavior. Identification of a child's issues or concerns must serve to avoid the use of unnecessary emergency behavior interventions with the child. Child concerns may include issues with food, eye contact, physical touch, personal property, or certain topics; and

(5) A designation of who will be responsible for meeting each of the child's needs.

(c) The plan must be compatible with the information included in the child's admission assessment.

(d) You must document the plan in the child's record.

(e) You must inform each professional level service provider and caregiver working with a child about the child's preliminary service plan.

(f) You must implement and follow the preliminary service plan.

§748.1337. What must a child's initial service plan include?

(a) You must base the child's initial service plan on the child's needs identified in the child's admission assessment. The service planning team may prioritize the child's service planning goals and objectives based on the child's admission assessment. However, any required service plan components not initially addressed must have a justification for the delay in addressing the needs.

(b) The child's initial service plan must be documented in the child's record and include those items that a preliminary plan must include (see §748.1331 of this title (relating to What are the requirements for a preliminary service plan?)), and the items noted below for each specific type of service that you provide the child:
Figure: 40 TAC §748.1337(b)

(c) For children receiving treatment services, the plan must address all of the child's waking hours.

§748.1339. Who must be involved in developing an initial service plan?

(a) A service planning team must develop the service plan. The team must consist of:

(1) At least one of the child's current caregivers; and

(2) At least one professional level service provider who provides direct services to the child.

(b) If you are providing treatment services to the child, the team must also consist of two of the following professions, which may or may not include additional members:

(1) A licensed professional counselor;

(2) A psychologist;

(3) A psychiatrist or physician;

(4) A licensed registered nurse;

(5) A licensed masters level social worker;

(6) A licensed or registered occupational therapist; or

(7) Any other person in a related discipline or profession that is licensed or regulated in accordance with state law.

(c) The child, as appropriate, and the parents must be invited to the meeting to develop the service plan.

§748.1341. When must I inform the child's parent(s) of an initial service plan meeting?

(a) You must give the child's parent(s) at least two weeks advance notice of the meeting.

(b) The child's record must include documentation of the notice and any responses from the parents.

§748.1347. What must I document regarding a professional level service provider's participation in the development of an initial service plan?

(a) You must document the professional level service provider's:

(1) Name; and

(2) Date of participation.

(b) The professional level service provider must sign and date the document. If the provider disagrees with any portion of the plan, the provider must document the issue(s) of contention before signing it.

§748.1349. With whom do I share the initial service plan?

(a) You must give a copy or summary of the initial service plan to the:

(1) Child, when appropriate;

(2) Child's parents; and

(3) Child's caregivers.

(b) If you do not share the service plan or summary with the child, you must document your justification for not sharing the plan in the child's record.

(c) You must document in the child's record that you provided a copy or summary of the service plan to the child's parents.

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DIVISION 5. SERVICE PLAN REVIEWS AND UPDATES

40 TAC §§748.1381, 748.1383, 748.1385, 748.1387, 748.1389

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1381. How often must I review and update a service plan?

Except for when the child's placement within your operation changes because of a change in the child's needs, you must review and update the service plan as follows:

Figure: 40 TAC §748.1381

§748.1383. How does a child's transfer affect the timing of the review of a child's service plan?

(a) You must review a child's service plan whenever the child's placement changes because of a change in the child's needs.

(b) If the child's placement changes for another reason:

(1) The child's service planning team must approve the decision not to review the plan; and

(2) You must document the decision not to review the plan.

§748.1385. How do I review and update a service plan?

To review and update a service plan, you must:

(1) Evaluate the child's progress and the effectiveness of strategies and techniques used toward meeting identified needs, including educational progress reports and medical interventions;

(2) Identify any new needs and strategies or techniques to meet these needs, including instructions to appropriate employees;

(3) Document any achieved or changed objectives;

(4) If the review shows no progress towards meeting the identified needs of the child, document reasons for continued placement;

(5) Evaluate the possible effectiveness and side effects in the use of psychotropic medications prescribed for the child, any change in psychotropic medications during the period since the last review, and the behaviors and reactions of the child observed by caregivers, professional level service providers, and parents, if applicable;

(6) Document visitation and contacts between the child and the child's parents, the child and the child's siblings, and the child and the child's extended family;

(7) Update the estimated length-of-stay and discharge plans, if changed;

(8) Determine for children receiving treatment services for emotional disorders, pervasive developmental disorders, or primary medical needs whether to:

(A) Continue the placement;

(B) Continue the placement as child-care services;

(C) Transfer the child to a less restrictive setting; or

(D) Refer the child to an inpatient hospital;

(9) Evaluate the use and effectiveness of emergency behavior intervention techniques, if used, since the last service plan. If applicable, this evaluation must focus on:

(A) The frequency, patterns, and effectiveness of types of emergency behavior interventions;

(B) Strategies to reduce the need for emergency behavior interventions overall; and

(C) Specific strategies to reduce the need for use of personal and mechanical restraints, emergency medication, and/or seclusion, where applicable;

(10) Document in the child's record the review and update of the plan; and

(11) Document the names of the persons participating in the review and update.

§748.1387. Are the notification, participation, implementation, and documentation requirements for a service plan review and update the same as for an initial service plan?

Yes, the same requirements found in Division 4 of this subchapter (relating to Service Plans) apply to a service plan review and update.

§748.1389. How often must I re-evaluate the intellectual functioning of a child receiving treatment services for mental retardation?

(a) Each child's intellectual functioning must be re-evaluated at least every three years by a psychologist qualified to provide psychological testing; or

(b) A psychologist must determine the need and frequency for a specific child's intellectual functioning to be re-evaluated, such as a young child who may require more frequent testing. This determination, including justification for the time frame, must be documented in the child's record annually by the service planning team.

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DIVISION 6. DISCHARGE AND TRANSFER PLANNING

40 TAC §§748.1431, 748.1433, 748.1435, 748.1437, 748.1439, 748.1441, 748.1443, 748.1445

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1431. What does a "transfer" of a child in care mean?

A transfer refers to a child in care who is moved from one of your programs to another one of your programs operated under the same permit or at the same location.

§748.1433. Who must plan a child's non-emergency discharge or transfer?

(a) You must involve the following persons in planning the child's non-emergency discharge or transfer:

(1) At least one of the child's current caregivers; and

(2) At least one professional level service provider involved in the child's service planning.

(b) You must invite the following persons to participate in planning the child's non-emergency discharge or transfer, if appropriate:

(1) The child;

(2) The child's parent(s); and

(3) Any other person pertinent to the child's care.

(c) If you are unable to plan the transfer or discharge with the persons as required in subsections (a) and (b) of this section, you must document in the child's record the reason why. For example, an emergency transfer or discharge was necessary or the child met the requirements to consent for emergency care services and decided not to include his parents in planning for the child's transfer or discharge.

(d) If a child in your care is not receiving treatment services, you must inform him of his non-emergency discharge or transfer at least four days prior to the date of the discharge or transfer, unless your licensed child-care administrator or a professional level service provider has clear justification for not giving him such notice. The licensed child-care administrator or professional level service provider who determines the justification for the child not having the advance notice of the discharge or transfer, must put the justification in writing and sign and date it. The justification must be in the child's record.

(e) If a child in your care is receiving treatment services, you must inform him of his non-emergency discharge or transfer at least four days prior to the date of the discharge or transfer, unless your treatment director, three members of the child's service planning team, or the child's psychiatrist or psychologist has justification for not giving him such notice. Whoever determines the justification for the child not having the advance notice of the discharge or transfer must put the justification in writing and sign and date it. The justification must be in the child's record.

§748.1437. What must I document in the child's record regarding a planned discharge or transfer?

Your documentation of a planned discharge or transfer is called a "discharge or transfer summary" and must include:

(1) A discharge or transfer summary showing services provided to the child, accomplishments, assessment of remaining needs, and recommendations about the services to meet those needs;

(2) The date and circumstances of the discharge or transfer;

(3) Discharge or transfer medications and/or prescriptions for medications;

(4) Support resources for the child, including telephone numbers and addresses;

(5) Aftercare plans and recommendations, including medical, psychiatric, psychological, dental, educational, and social appointments;

(6) Date and time the child was informed of his discharge or transfer; and

(7) For discharges, the name, address, telephone number, and relationship of the person to whom you discharge the child, unless the child legally consents to his discharge. If the child legally consents to his discharge and does not want to involve the child's parent(s), you must document this in the child's record.

§748.1439. When I discharge a child to another operation or child-placing agency, what information must I provide them?

(a) On or before the child's discharge, you must attempt to obtain legal consent to release the discharge summary and the information in subsection (b) of this section. If consent is not obtained, your attempt to obtain consent must be documented in the child's record. If consent is obtained, the information must be provided to the receiving operation within 30 days of the date the child is discharged.

(b) Copies of the following information from the child's record must also be released with the discharge summary:

(1) The child's background information, including progress notes for the past 60 days, if applicable;

(2) Any unresolved incidents or investigations involving the child, if applicable;

(3) Assessments and/or evaluations that you have performed for the child, including the child's admission assessment, diagnostic assessment, educational assessment, neurological assessment, and psychiatric or psychological evaluation;

(4) The child's service plans while in your care for the past 12 months;

(5) A list of medications the child is taking, the dosage, frequency, and reason the medication was prescribed; and

(6) Any treatment for a physical condition that is in progress and requires continuing or follow-up medical care.

§748.1443. What constitutes an emergency discharge or transfer?

An emergency discharge or transfer occurs when:

(1) The parent withdraws a child unexpectedly from care;

(2) There is a medical emergency requiring inpatient care;

(3) The child is absent from your operation and cannot be located; or

(4) There is an immediate danger to the child or others and you determine that you cannot serve the child.

§748.1445. What must I document in the child's record at the time of an emergency discharge or transfer?

At the time of an emergency discharge or transfer, you must document the following in the child's record:

(1) The circumstances necessitating the emergency discharge or transfer;

(2) The explanation given to the child regarding the reason for the discharge or transfer;

(3) The child's reaction to the discharge or transfer;

(4) The date of discharge or transfer; and

(5) The name, address, and relationship of the person to whom you transfer or discharge the child, where applicable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 7. RELEASE OF CHILD

40 TAC §748.1481

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.1481. To whom may I release a child?

(a) Except in an emergency, you must only release a child to the child's parent, a person designated by the parent, law enforcement authorities, or a person authorized by law to take possession of the child.

(b) You must instruct all employees and service providers to follow your policies for:

(1) Releasing a child;

(2) Verifying the identity of a person authorized to pick up a child but whom the caregiver does not know;

(3) Recording the identity of the person in a log or other designated location; and

(4) Retaining the identifying information at the operation until the child returns.

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SUBCHAPTER J. CHILD CARE
DIVISION 1. DENTAL CARE

40 TAC §§748.1501, 748.1503, 748.1505

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1501. What general dental requirements must my operation meet?

(a) A child in your care must receive dental care:

(1) Initially, according to the requirements in §748.1225 of this title (relating to What are the dental requirements when I admit a child into care?);

(2) At as early an age as necessary;

(3) As needed for relief of pain and infections; and

(4) As needed for ongoing maintenance of dental health.

(b) The child's record must include a written record of each dental examination specifying the:

(1) Date of the examination;

(2) Procedures completed;

(3) Follow-up treatment recommended and any appointments scheduled;

(4) The child's refusal to accept dental treatment, if applicable; and

(5) A copy of the results of the dental examination that is signed and dated by the health-care professional who performed the examination.

(c) You must obtain follow-up dental work recommended by the dentist, such as treatment of cavities and cleaning.

§748.1505. Who must perform dental examinations and provide dental treatment?

A health-care professional licensed in the United States to practice dentistry must provide dental care.

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DIVISION 2. MEDICAL CARE

40 TAC §§748.1531, 748.1533, 748.1535, 748.1539, 748.1541, 748.1543, 748.1545, 748.1547, 748.1549, 748.1551

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.043.

§748.1535. Who must perform medical examinations and provide medical treatment for a child?

A health-care professional licensed in the United States to practice in an appropriate medical or health-care discipline must perform medical examinations and provide medical treatment for a child.

§748.1543. What documentation is acceptable for an immunization record?

(a) An original or facsimile of the immunization record must include:

(1) The child's name and birth date;

(2) The number of doses and vaccine type;

(3) The month, day, and year the child received each vaccination; and

(4) One of the following:

(A) A signature or rubber stamp signature from the health-care professional who administered the vaccine; or

(B) A registered nurse's documentation of the immunization that is provided by a health-care professional, as long as the health-care professional's name and qualifications are documented.

(b) Documentation of an immunization record on file at your operation may be:

(1) The original record;

(2) A photocopy;

(3) An official immunization record generated from a state or local health authority, such as a registry; or

(4) A record received from school officials, including a record from another state.

§748.1551. How often must the physician review a child with primary medical needs?

(a) A licensed physician must review a child's primary medical needs:

(1) At least every 90 days or on a schedule recommended by the child's physician; and

(2) Whenever a medical or related problem occurs.

(b) The review must address:

(1) Whether the child can continue to be cared for appropriately in the operation; and

(2) Any new or changed orders regarding the items outlined in §748.1219(3)(B) of this title (relating to What are the additional admission requirements when I admit a child for treatment services?).

(c) Documentation of each physician review must be filed in the child's record.

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DIVISION 3. COMMUNICABLE DISEASES

40 TAC §748.1581, §748.1583

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1581. What health precautions must I take if someone in my operation has a communicable disease?

(a) You must notify the Department of State Health Services (DSHS) after you become aware that a person in your care, a person who resides at your operation, an employee, a contract service provider, or a volunteer has contracted a communicable disease that the law requires you to report to the DSHS as specified in 25 TAC 97, Subchapter A (relating to Control of Communicable Diseases).

(b) If a person in your care or a person who resides at your operation has symptoms of a communicable disease that is reportable to the Department of State Health Services, you must:

(1) Consult a health-care professional about the person's treatment;

(2) Follow the treating physician's orders, which may include separating the person from others;

(3) Notify the person's parent, if applicable; and

(4) Sanitize all items used by the sick person before another person uses one of them.

(c) If a health-care professional diagnoses a person in your care or a person who resides at your operation with a communicable disease that may be spread through casual contact, a health-care professional must authorize the person's participation in routine activity at your operation. The authorization must:

(1) Be in the person's record, if the person is in care at your operation;

(2) Include a written statement that the person will not pose a serious threat to the health of the others; and

(3) Include any specific instructions and precautions to be taken for the protection of others.

(d) If an employee, contract service provider, or volunteer has a communicable disease that may be spread through casual contact, you must obtain written authorization from a health-care professional for the person to be present at the operation. The written authorization must include a statement that the person will not pose a serious threat to the health of the others.

(e) You must follow any written instructions and precautions specified by a health-care professional.

§748.1583. Who must have a tuberculosis (TB) examination?

(a) All persons over the age of one year old who live, work, or volunteer at your operation must be screened for tuberculosis as recommended by the Center for Disease Control (CDC). This includes contract service providers.

(b) If a person over one year old has lived, worked, or volunteered at a regulated residential child-care operation within 12 months prior to living, working, or volunteering at your operation, a new baseline tuberculosis screening is not required. However, you must have documentation of the person's previous screening on file at your operation. For example, an employee beginning employment in a regulated residential child-care operation for the first time would need a baseline tuberculosis screening. Employment in a different residential child-care operation would not require a new screening as long as a copy of the screening documentation went with the employee to each new place of employment. If the employee left employment in regulated residential child-care for more than 12 months and then returned, a new screening would be required.

(c) A copy of medical documentation of results of TB screening, chest radiograph, and/or treatment (if treatment is required) must be maintained in the person's file at the site where the person lives, works, or volunteers.

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DIVISION 4. PROTECTIVE DEVICES

40 TAC §§748.1611, 748.1613, 748.1615, 748.1617

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1611. What is a protective device?

(a) A protective device:

(1) Protects a person from involuntary self-injurious behavior or permits wounds to heal; and

(2) Does not prohibit a person's mobility.

(b) Examples of a protective device are helmets, elbow guards, mittens, bedrails, and wheelchair seat belts.

(c) If used appropriately, devices intended to encourage mobility or minimally restrain a young child for safety purposes, such as wheelchairs, car seats, high chairs, strollers, bed rails, and child leashes manufactured and sold specifically to harness a young child for safety purposes, are not protective devices.

§748.1615. May I use protective devices?

(a) You may use protective devices if a licensed physician orders their use for a specific child. The orders must indicate the circumstances under which the protective device is permitted.

(b) You may not use protective devices as:

(1) Punishment;

(2) Retribution or retaliation;

(3) A means to get a child to comply;

(4) A convenience for caregivers or other persons; or

(5) A substitute for effective treatment or habilitation.

(c) You must document the use of protective devices in the child's record, service plan, and service plan reviews. The service planning team must discuss and document in the child's service plan reviews:

(1) Clinical justification for continued use of protective devices; and

(2) Ways to reduce the need for protective devices.

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DIVISION 5. SUPPORTIVE DEVICES

40 TAC §§748.1631, 748.1633, 748.1635

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1631. What is a supportive device?

(a) A supportive device is used:

(1) To support a person's posture;

(2) To assist a person who cannot obtain and/or maintain normal physical functioning to improve his mobility and independent functioning; or

(3) As an adjunct to proper care and treatment, for example physical therapy.

(b) The purpose of a supportive device is not to restrict movement.

§748.1633. May I use supportive devices?

(a) You may use supportive devices if a licensed physician orders their use for a specific child. The orders must indicate the circumstances under which the supportive device is permitted.

(b) You may not use a supportive device as a substitute for appropriate nursing care.

(c) You may not use supportive devices that include tying or depriving or limiting the use of a child's hands or feet.

(d) You may not use supportive devices as:

(1) Punishment;

(2) Retribution or retaliation;

(3) Means to get a child to comply;

(4) A convenience for caregivers or other persons; or

(5) A substitute for effective treatment or habilitation.

(e) If a device is not specifically for assisting with sleep or safety during sleep, you must remove the device during rest periods.

(f) You must document the use of supportive devices in the child's record, service plan, and service plan reviews. The service planning team must discuss and document in the child's service plan review:

(1) Clinical justification for continued use of supportive devices; and

(2) Ways to reduce the need for supportive devices.

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DIVISION 6. TOBACCO USE

40 TAC §748.1661

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.1661. What policies must I enforce regarding tobacco products?

(a) A child may not use or possess tobacco products.

(b) An adult may not smoke tobacco products in the children's living quarters or inside any building on your premises where children are present.

(c) An adult may only smoke tobacco products on your premises at a safe distance from the children's living quarters.

(d) No one may smoke tobacco products in motor vehicles when transporting children.

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DIVISION 7. NUTRITION AND HYDRATION

40 TAC §§748.1691, 748.1693, 748.1695, 748.1697, 748.1699, 748.1701, 748.1703, 748.1705, 748.1707, 748.1709

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1693. What type of food and water must I provide children?

(a) You must provide a child with food that is:

(1) Of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the United States Department of Agriculture guidelines; and

(2) Appropriate for the child's age and activity level.

(b) You must not serve a child nutrient concentrates and supplements, such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances, in lieu of food to meet the child's daily nutritional needs, except with written instructions from a licensed health-care professional.

(c) You must ensure drinking water is always available to each child and is served in a safe and sanitary manner. Children must be well hydrated and must be encouraged to drink water during physical activity and in warm weather.

§748.1697. What are the specific requirements for feeding toddlers and older children?

(a) A toddler or older child must eat meals in the dining areas unless the service planning team's recommendations are to the contrary.

(b) Food service practices for children receiving treatment services for primary medical needs or mental retardation, including nonmobile children, must encourage self-help and development.

§748.1707. What are the requirements for tube-feeding formula?

(a) A registered or licensed dietitian, physician, or a registered nurse must ensure the caregiver that prepares the formula is adequately trained and has demonstrated competency in preparing the formula.

(b) Tube feeding formulas must supply the recommended dietary allowance for each child.

(c) You must prepare and store the formula:

(1) According to directions; or

(2) As prescribed by a health-care professional.

§748.1709. What are the requirements for using a nasogastric tube to feed a child?

(a) Only the following may insert a nasogastric tube:

(1) A physician; or

(2) A registered nurse according to a physician's written orders.

(b) You must document each insertion in the child's record. The documentation for each insertion must include the:

(1) Signature of the nurse who inserted the tube; and

(2) Date of the insertion.

(c) You must follow the physician's written orders concerning the tube.

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DIVISION 8. ADDITIONAL REQUIREMENTS FOR INFANT CARE

40 TAC §§748.1741, 748.1743, 748.1745, 748.1747, 748.1749, 748.1751, 748.1753, 748.1755, 748.1757, 748.1759, 748.1761, 748.1763, 748.1765

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1743. What are the basic care requirements for an infant?

(a) Each infant must receive individual attention, including playing, talking, cuddling, and holding.

(b) When an infant is upset, a caregiver must hold and comfort the infant.

(c) A caregiver must provide prompt attention to an infant's physical needs, such as feeding and diapering.

(d) An infant's caregiver must ensure that the environment is safe. For example, the caregiver must free the area of objects that may choke or harm the infant, take measures to prevent electric shock, free the area of furniture that is in disrepair or unstable, and allow no unsupervised access to water to prevent the risk of drowning.

(e) An infant's caregiver must never leave the infant unsupervised. A sleeping infant is considered supervised if the caregiver is within eyesight or hearing range of the child and can intervene as needed, or if the caregiver uses a video camera or audio monitoring device to monitor the child and is close enough to the child to intervene as needed.

§748.1751. What specific safety requirements must my cribs meet?

(a) All cribs must have:

(1) A firm, flat mattress that snugly fits the sides of the crib. The mattress must not be supplemented with additional foam material or pads;

(2) Sheets that fit snugly and do not present an entanglement hazard;

(3) A mattress that is waterproof or washable;

(4) Secure mattress support hangers, and no loose hardware or improperly installed or damaged parts;

(5) A maximum of 2 3/8 inches between crib slats or poles;

(6) No corner posts over 1/16 inch above the end panels;

(7) No cutout areas in the headboard or footboard that would entrap a child's head or body; and

(8) Drop rails, if present, which fasten securely and cannot be opened by a child.

(b) You must sanitize each crib when soiled and before reassigning the crib to a different child.

(c) You must never leave a child in the crib with the rails down.

(d) You may not have stackable cribs.

§748.1753. Are mesh cribs or port-a-cribs allowed?

(a) You may use a full-size, portable, or mesh-side crib if:

(1) You follow the manufacturer's instructions;

(2) The crib has:

(A) Mesh that is securely attached to top rail, side rail, and floor plate; and

(B) Folded sides that securely latch in place when raised; and

(3) You never leave a child in a mesh-sided crib with a side folded down.

(b) If you become aware of a recall for the port-a-crib used, you must discontinue its use.

§748.1757. What types of equipment are not allowed for use with infants?

(a) You may not use any of the following types of equipment with infants:

(1) Baby walkers;

(2) Baby bungee jumpers;

(3) Accordion safety gates; and

(4) Toys that are small enough to swallow or choke a child.

(b) Children may not sleep on beanbags, waterbeds, or foam pads.

(c) You may not use soft bedding, such as stuffed toys, quilts, pillows, bumper pads, and comforters in a crib for an infant six months old or younger.

§748.1763. Are infants required to sleep on their backs?

Yes. You must place an infant not yet able to turn over on his own in a face-up sleeping position unless a health-care professional orders otherwise.

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DIVISION 9. ADDITIONAL REQUIREMENTS FOR TODDLER CARE

40 TAC §§748.1791, 748.1793, 748.1795

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1791. What are the basic care requirements for a toddler?

(a) Each toddler must receive individual attention, including playing, talking, and cuddling.

(b) A toddler's caregiver must ensure that the environment is safe. For example, the caregiver must free the area of objects that may choke or harm the infant, take measures to prevent electric shock, free the area of furniture that is in disrepair or unstable, and allow no unsupervised access to water to prevent the risk of drowning.

(c) A toddler's caregiver must never leave the toddler unsupervised. A sleeping toddler is considered supervised if the caregiver is within eyesight or hearing range of the child and can intervene as needed, or if the caregiver uses a video camera or audio monitoring device to monitor the child and is close enough to the child to intervene as needed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 10. ADDITIONAL REQUIREMENTS FOR PREGNANT CHILDREN

40 TAC §§748.1821, 748.1823, 748.1825

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1821. What information must I provide a pregnant child regarding her pregnancy?

You must:

(1) Ensure information, training, and counseling is available regarding health aspects of pregnancy, preparation for child birth, and recovery from child birth;

(2) Ensure the pregnant child receives nutritional counseling and guidance that meets generally accepted standards, including nutrition during pregnancy, lactation, and foods to avoid; and

(3) Inform the child of her right to be free from pressure to get an abortion, relinquish her child for adoption, or to parent her child.

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SUBCHAPTER K. OPERATIONS THAT PROVIDE CARE FOR CHILDREN AND ADULTS

DIVISION 1. SCOPE

40 TAC §748.1901

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 2. GENERAL REQUIREMENTS

40 TAC §§748.1931, 748.1933, 748.1935, 748.1937, 748.1939, 748.1941, 748.1943, 748.1945

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.1931. After a child in my care turns 18 years old, may the person remain in my care?

(a) A young adult may remain in your care up to the age of 22 years old in order to:

(1) Transition to independence, including attending college or vocational or technical training;

(2) Attend high school, a program leading to a high school diploma, or GED classes;

(3) Complete your program; or

(4) Stay with a minor sibling.

(b) A young adult who turns 18 in your care may remain in your care indefinitely if the person:

(1) Continues to need the same level of care; and

(2) Is unlikely to physically and/or intellectually progress over time.

§748.1933. May I admit a young adult into care?

Yes, you may admit a young adult into your operation:

(1) From another residential child-care operation if the reason for admittance is consistent with a condition listed in §748.1931 of this title (relating to After a child in my care turns 18 years old, may the person remain in my care?); or

(2) If the child is in the care of the Texas Department of Family and Protective Services.

§748.1943. Must adult residents have a tuberculosis (TB) examination?

Yes. You must meet applicable requirements listed in §748.1583 of this title (relating to Who must have a tuberculosis (TB) examination?).

§748.1945. What must I do if an adult resident has a positive tuberculosis test result?

You must meet applicable requirements listed in §748.1581 of this title (relating to What health precautions must I take if someone in my operation has a communicable disease?).

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SUBCHAPTER L. MEDICATION
DIVISION 1. ADMINISTRATION OF MEDICATION

40 TAC §§748.2001, 748.2003, 748.2005, 748.2009

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2001. What consent must I obtain to administer medications?

(a) You must obtain a general written consent to administer routine, preventive, and emergency medications.

(b) You must obtain a written, signed, and dated consent, specific to the psychotropic medication to be administered, from the person legally authorized to give medical consent before administering a new psychotropic medication to a child, per §748.2253 of this title (relating to If my operation employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give consent before requesting his consent for the child to be placed on psychotropic medication?) or §748.2255 of this title (relating to If my operation does not employ or contract with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give medical consent prior to the health-care professional prescribing psychotropic medications to a child in care?).

§748.2003. What medication requirements must my operation meet?

(a) To the best of your knowledge, you must inform the person legally authorized to give medical consent of the benefits, risks, and side effects of all prescription medication and treatment procedures used and the medical consequences of refusing them, and/or provide the name and telephone number of the prescribing health-care professional for more information.

(b) You must:

(1) Be informed about possible side effects of medications administered to the child;

(2) Store all medication in the original container unless you have an additional container with the same label and instructions;

(3) Administer all medications according to the instructions on the label or according to a prescribing health-care professional's subsequent signed orders (See §748.2005 of this title (relating to May I accept verbal orders on the administration of medication?));

(4) Administer each child's medication immediately after preparation;

(5) Ensure the child has taken the medication as prescribed;

(6) Ensure a person trained in and authorized to administer prescription medication administers the medication to a child in care unless the child is on a self-medication program;

(7) Maintain any documentation provided by the health-care professional on the administration of current prescription medication;

(8) Not physically force a child to take prescription medication;

(9) Ensure that your employees do not provide any prescription medication or treatment to a child except on written orders of a health-care professional;

(10) Not borrow or administer prescription medication to a child that is prescribed to another person; and

(11) Not administer prescription medication to more than one child from the same container. Only the child for whom the prescription medication was prescribed may use the medication.

§748.2005. May I accept verbal orders on the administration of medication?

(a) Assuming you have obtained written consent according to §748.2001 of this title (relating to What consent must I obtain to administer medications?), a licensed health-care professional may provide verbal orders. However, the health-care professional must write and sign orders within 72 hours of the verbal order.

(b) The verbal order must be documented in the child's record, including the health care professional's name and the date and time of the call.

§748.2009. What are the requirements for administering nonprescription medication and vitamins?

(a) You must follow the label and ensure the nonprescription medication is not contraindicated with any other medication prescribed to the child or the child's medical conditions.

(b) You may give nonprescription medication or vitamins to more than one child from one container.

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DIVISION 2. SELF-ADMINISTRATION OF MEDICATION

40 TAC §748.2051, §748.2053

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 3. MEDICATION STORAGE AND DESTRUCTION

40 TAC §748.2101, §748.2103

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2101. What medication storage requirements must my operation meet?

You must:

(1) Store medication in a locked container;

(2) Keep medication inaccessible other than to employees responsible for stored medication;

(3) Ensure the medication storage area has a separate container where medications "for external use only" are stored separately from other medications;

(4) Store medication covered by Section II of the Texas Controlled Substances Act under double lock in a separate container. For example, a double lock can include a lock on the cabinet or filing cabinet and the door to the closet where medications are stored;

(5) Make provisions for securely storing medication that requires refrigeration;

(6) Keep medication storage area(s) clean and orderly;

(7) Remove discontinued medication immediately and destroy it in a way that ensures that children do not have access to it;

(8) Remove medication on or before the expiration date and destroy it in a way that ensures that children do not have access to it;

(9) Remove medication of a discharged or deceased child immediately and destroy it in a way that ensures that children do not have access to it; and

(10) Provide prescription medication to the person to whom a child is discharged or transferred if the child is taking the medication at that time.

§748.2103. What are the requirements for discontinued or expired medication?

(a) Discontinued medication, expired medication, and medication left at your operation must be inventoried and stored separately from current medications as directed by the administrator.

(b) When you have an accumulation of this medication, you must destroy the medication in accordance with state and federal law and in a way that ensures children do not have access to it. The medication must be destroyed by:

(1) A health-care professional or pharmacist; or

(2) The licensed child-care administrator and another adult who is not a resident.

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DIVISION 4. MEDICATION RECORDS

40 TAC §748.2151

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.2151. What records must I maintain for each child receiving medication?

(a) You must maintain a cumulative record of all prescription medication dispensed to a child and all nonprescription medication, excluding vitamins, dispensed to a child under five years old. You must maintain the medication record during the time that you provide services to the child. This record must include the:

(1) Child's full name;

(2) Prescribing health-care professional's name, if applicable;

(3) Medication name, strength, and dosage;

(4) Date (day, month, and year) and time the medication was administered;

(5) Name and signature of the person who administered the medication;

(6) Child's refusal to accept medication, if applicable;

(7) Reasons for administering the medication, including the specific symptoms, condition, and/or injuries of the child that you are treating, for PRN prescriptions and nonprescription medications (excluding vitamins) for children under five years old; and

(8) Running count of each child's prescribed medication. The medication count must match the medication documentation.

(b) Identification of any prohibited prescription medication, non-prescription medication, or vitamins for each child must be maintained in the medication record that must be incorporated into the child's record.

(c) The medication records of prescription and applicable nonprescription medication dispensed to the child must be incorporated into the child's record.

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DIVISION 5. MEDICATION AND LABEL ERRORS

40 TAC §§748.2201, 748.2203, 748.2205

The new sections are adopted under Human Resources Code, (HRC) §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2201. What is a medication error?

A medication error includes, but is not limited to, the following:

(1) A child receives the wrong medication;

(2) A child receives medication prescribed for someone else;

(3) A child receives the wrong dosage of medication;

(4) A child receives medication at the wrong time;

(5) A medication dose is skipped or missed;

(6) A child receives expired medication;

(7) Not following the medication administration instructions, such as giving a child medication on an empty stomach when the medication should be given with food; and

(8) A child receives medication that was not stored as required to maintain the effectiveness of the medication, such as refrigerating or not refrigerating the medication or exposing the medication to heat or sunlight.

§748.2203. What must I do if I find a medication error?

(a) If you find a medication error regarding a prescribed medication, you must contact a health-care professional immediately, unless the error is the type described in paragraph (4) or (5) of §748.2201 of this title (relating to What is a medication error?), and follow the health-care professional's recommendations.

(b) If you find a medication error regarding an nonprescription medication, you must take the appropriate and necessary actions as required by the circumstances.

(c) For all medication errors, you must document the following within 24 hours:

(1) The time and date of the error;

(2) The medication error;

(3) The time and date of the call(s) to the licensed health-care professional, if applicable;

(4) The name and title of the health-care professional contacted, if applicable; and

(5) The health-care professional's medical recommendations for ensuring the child's safety, if applicable.

§748.2205. What must I do if I find a medication label error?

If you find a medication label error, you must:

(1) Report the error to the pharmacist; and

(2) Have the label on the medication container corrected as soon as possible, but no later than the next business day.

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DIVISION 6. SIDE EFFECTS AND ADVERSE REACTIONS TO MEDICATION

40 TAC §748.2231, §748.2233

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 7. USE OF PSYCHOTROPIC MEDICATION

40 TAC §§748.2253, 748.2255, 748.2257, 748.2259, 748.2261

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2259. What information must I document about a child's use of psychotropic medication?

(a) You must maintain a daily record of the child's use of such medication according to the requirements in §748.2151 of this title (relating to What records must I maintain for each child receiving medication?).

(b) You must document in the child's record a description of any noticeable change in the child's behavior in response to the medication.

(c) You must provide the information in subsection (b) of this section to the prescribing health-care professional or the child's current health-care professional to use in evaluating the appropriateness of continuing the medication. You must document the health-care professional's evaluation and review in the child's record.

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SUBCHAPTER M. DISCIPLINE AND PUNISHMENT

40 TAC §§748.2301, 748.2303, 748.2305, 748.2307, 748.2309, 748.2311

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2301. What are the requirements for disciplinary measures?

(a) Only a caregiver known to and knowledgeable of a child may discipline the child.

(b) Each disciplinary measure must:

(1) Be consistent with your policies and procedures;

(2) Not be physically or emotionally damaging to the child;

(3) Be individualized to meet each child's needs;

(4) Be appropriate to the child's level of understanding, age, and developmental level; and

(5) Be appropriate to the incident and severity of the behavior demonstrated.

(c) The goal of each disciplinary measure must be to teach the child acceptable behavior and self-control. The caregiver must explain the reason for the disciplinary measure when the caregiver imposes the measure.

§748.2307. What other methods of punishment are prohibited?

In addition to corporal punishment, prohibited discipline techniques include:

(1) Any harsh, cruel, unusual, unnecessary, demeaning, or humiliating discipline or punishment;

(2) Denial of mail or visits with their families as discipline or punishment;

(3) Threatening with the loss of placement as discipline or punishment;

(4) Using sarcastic or cruel humor, and verbal abuse;

(5) Maintaining an uncomfortable physical position, such as kneeling, or holding his arms out;

(6) Pinching, pulling hair, biting, or shaking a child;

(7) Putting anything in or on a child's mouth, such as soap or tape;

(8) Humiliating, shaming, ridiculing, rejecting, or yelling at a child;

(9) Subjecting a child to abusive or profane language;

(10) Placing a child in a dark room, bathroom, or closet;

(11) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age;

(12) Confining a child to a highchair, box, or other similar furniture or equipment as discipline or punishment;

(13) Denying basic child rights as discipline or punishment;

(14) Withholding food that meets the child's nutritional requirements; and

(15) Using or threatening to use emergency behavior intervention as discipline or punishment.

§748.2309. To what extent may I restrict a child's activities as a behavior management tool?

(a) Within limits, a caregiver may restrict a child's activities as a behavior management tool.

(b) Restrictions of activities, other than school or chores, which will be imposed on a child for more than seven days, must have prior approval by the treatment director, service planning team, or professional level service provider.

(c) Restrictions to a particular room or building that will be imposed on a child for more than 24 hours must have prior approval by the treatment director, service planning team, or professional level service provider.

(d) You must inform the child and parent about any restrictions that you place on the child.

(e) Documentation of all approvals, justification for the restriction, and informing the child and parents must be in the child's record.

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SUBCHAPTER N. EMERGENCY BEHAVIOR INTERVENTION

DIVISION 1. DEFINITIONS

40 TAC §748.2401

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.2401. What do certain words mean in this subchapter?

These words have the following meaning in this subchapter:

(1) Chemical restraint--A type of emergency behavior intervention that uses chemicals or pharmaceuticals through topical application, oral administration, injection, or other means to immobilize or sedate a child as a mechanism of control. The use of medications that have a secondary effect of immobilizing or sedating a child, but are prescribed by a treating health-care professional and administered solely for medical or dental reasons, is not chemical restraint and is not regulated as such under this chapter.

(2) De-escalation--See §748.43(12) of this title (relating to What do certain words and terms mean in this chapter?).

(3) Emergency behavior intervention--See §748.43(16) of this title.

(4) Emergency medication--A type of emergency behavior intervention that uses chemicals or pharmaceuticals through topical application, oral administration, injection, or other means to modify a child's behavior. The use of medications that have a secondary effect of modifying a child's behavior, but are prescribed by a treating health-care professional and administered solely for medical or dental reasons (e.g. benadryl for an allergic reaction or medication to control seizures), is not emergency medication and is not regulated as such under this chapter.

(5) Emergency situation--A situation in which attempted preventative de-escalatory or redirection techniques have not effectively reduced the potential for injury and it is immediately necessary to intervene to prevent:

(A) Imminent probable death or substantial bodily harm to the child because the child attempts or continually threatens to commit suicide or substantial bodily harm; or

(B) Imminent physical harm to another because of the child's overt acts, including attempting to harm others. These situations may include aggressive acts by the child, including serious incidents of shoving or grabbing others over their objections. These situations do not include verbal threats or verbal attacks.

(6) Mechanical restraint--A type of emergency behavior intervention that uses the application of a device to restrict the free movement of all or part of a child's body in order to control physical activity.

(7) Personal restraint--A type of emergency behavior intervention that uses the application of physical force without the use of any device to restrict the free movement of all or part of a child's body in order to control physical activity. Personal restraint includes escorting, which is when a caregiver uses physical force to move or direct a child who physically resists moving with the caregiver to another location.

(8) PRN--See §748.43(35) of this title.

(9) Prone restraint--Placing a child in a chest down restraint hold.

(10) Seclusion--A type of emergency behavior intervention that involves the involuntary separation of a child from other residents and the placement of the child alone in an area from which the resident is prevented from leaving by a physical barrier, force, or threat of force.

(11) Short personal restraint--A personal restraint that does not last longer than one minute before the child is released.

(12) Supine restraint--Placing a child in a chest up restraint hold.

(13) Transitional hold--The use of a temporary restraint technique that lasts no longer than one minute as part of the continuation of a longer personal or mechanical restraint.

(14) Triggered review--A review of a specific child's placement, treatment plan, and orders or recommendations for intervention, because a certain number of interventions have been made within a specified period of time (e.g. three seclusions within a seven-day period).

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DIVISION 2. TYPES OF EMERGENCY BEHAVIOR INTERVENTION THAT MAY BE ADMINISTERED

40 TAC §§748.2451, 748.2453, 748.2455, 748.2459, 748.2461, 748.2463

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2451. What types of emergency behavior intervention may I administer?

(a) If permitted in your policies and you meet the requirements of this subchapter, you may administer the following types of emergency behavior intervention to a child in your care:

(1) Short personal restraint;

(2) Personal restraint;

(3) Emergency medication;

(4) Seclusion:

(A) Only for children with emotional disorders or pervasive developmental disorders; and only if you provide treatment services to 25 or more children with emotional disorders or pervasive developmental disorders, or if more than 30% of the children in your care receive treatment services for emotional disorders or pervasive development disorders. Seclusion is not permitted for children receiving therapeutic camp services; or

(B) Only if you provide emergency care services to the child and only while waiting for the arrival of law enforcement or emergency medical services; and

(5) Mechanical restraint, only if you have a Residential Treatment Center permit.

(b) You may never administer chemical restraints.

(c) Protective and supportive devices, used appropriately, are not considered emergency behavior interventions. For information on protective and supportive devices, see Divisions 4 and 5 of Subchapter J of this chapter (relating to Child Care).

§748.2453. Who may administer emergency behavior intervention?

Only a caregiver qualified in emergency behavior intervention may administer any form of emergency behavior intervention, except for the short personal restraint of a child.

§748.2455. What actions must a caregiver take before using a permitted type of emergency behavior intervention?

Before using a permitted type of emergency behavior intervention, the caregiver must:

(1) Attempt less restrictive behavior interventions that prove to be ineffective at defusing the situation; and

(2) Determine that the basis for the emergency behavior intervention is:

(A) An emergency situation;

(B) A need for a personal restraint to administer intramuscular medication or other medical treatments prescribed by a licensed physician, such as administering insulin to a child with diabetes; or

(C) A need for a personal restraint in a general residential operation where a child is significantly damaging property, such as breaking car windows or putting holes into walls. If this is the basis of the personal restraint, only a short personal restraint may be used and only to prevent the damage.

§748.2459. What is the appropriate use for a short personal restraint?

Generally, a short personal restraint is used in urgent situations, such as:

(1) To protect the child from external danger that causes imminent significant risk to the child, such as preventing the child from running into the street or coming into contact with a hot stove. The restraint must end immediately after the danger is averted;

(2) To intervene when a child under five years old (chronological or developmental age) demonstrates disruptive behavior, if other efforts to de-escalate the child's behavior have failed; or

(3) When a child over five years old demonstrates behavior disruptive to the environment or milieu, such as disrobing in public, provoking others that creates a safety risk, or to intervene to prevent a child from physically fighting.

§748.2461. What precautions must a caregiver take when implementing a short personal restraint?

(a) When a caregiver implements a short personal restraint, the caregiver must:

(1) Minimize the risk of physical discomfort, harm, or pain to the child; and

(2) Use the minimal amount of reasonable and necessary physical force.

(b) A caregiver may not use any of the following techniques as a short personal restraint:

(1) A prone or supine restraint;

(2) Restraints that impair the child's breathing by putting pressure on the child's torso, including leaning a child forward during a seated restraint;

(3) Restraints that obstruct the airways of the child or impair the breathing of the child, including procedures that place anything in, on, or over the child's mouth, nose, or neck, or impede the child's lungs from expanding;

(4) Restraints that obstruct the caregiver's view of the child's face;

(5) Restraints that interfere with the child's ability to communicate or vocalize distress; or

(6) Restraints that twist or place the child's limb(s) behind the child's back.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. ORDERS

40 TAC §§748.2501, 748.2503, 748.2505, 748.2507

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2501. Are written orders required to administer emergency behavior intervention, and if so, who can write them?
According to the following chart, written orders by certain professionals are required to administer certain emergency behavior intervention:
Figure: 40 TAC §748.2501

§748.2505. What information must a written order include?

(a) All written orders must include the following:

(1) A statement that the particular type of emergency behavior intervention may only be used in an emergency situation;

(2) Designation of the specific intervention and procedure or technique that is authorized;

(3) Any specific measures for ensuring the child's health, safety, and well being, and the privacy of the setting that safeguards the child's personal dignity;

(4) A complete description of the behaviors and circumstances under which the intervention may be used;

(5) Instructions for observation or heightened observation of the child during the intervention;

(6) The behaviors that indicate the child is ready to be released from the intervention;

(7) The maximum length of time the child may be restrained or secluded regardless of behaviors exhibited;

(8) The prescribing professional's consideration of any potential medical and/or psychiatric contraindications for the specific child, such as a history of physical or sexual abuse or victimization involving the type of intervention; and

(9) Clinical justification for the intervention.

(b) For emergency medication, the written order must also include instructions on how to administer the medication.

(c) For mechanical restraint, the written order must also include the specific device or devices authorized.

§748.2507. Under what conditions are PRN orders permitted for a specific child?
PRN orders for certain emergency behavior interventions are permitted under the following conditions:
Figure: 40 TAC §748.2507

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DIVISION 4. RESPONSIBILITIES DURING ADMINISTRATION OF ANY TYPE OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §748.2551, §748.2553

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. ADDITIONAL RESPONSIBILITIES DURING ADMINISTRATION OF A PERSONAL RESTRAINT

40 TAC §§748.2601, 748.2603, 748.2605

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of

services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2601. Who must monitor a personal restraint?

(a) During any personal restraint, a caregiver qualified in emergency behavior intervention must monitor the child's breathing and other signs of physical distress and take appropriate action to ensure adequate respiration, circulation, and overall well-being.

(b) If available, a caregiver who is not restraining the child should monitor the child. However, general residential operations and residential treatment centers with a capacity of more than 16 children must monitor prone and supine restraints as required in §748.2605(b) of this title (relating to What personal restraint techniques are prohibited?).

§748.2605. What personal restraint techniques are prohibited?

(a) The following personal restraint techniques are prohibited:

(1) Restraints that impair the child's breathing by putting pressure on the child's torso, including restraints that obstruct the child's lungs from expanding such as leaning a child forward during a seated restraint;

(2) Restraints that obstruct the child's airway, including procedures that place anything in, on, or over the child's mouth, nose, or neck;

(3) Restraints that obstruct a caregiver's ability to view the child's face;

(4) Restraints that interfere with the child's ability to communicate or vocalize distress; or

(5) Restraints that twist or place the child's limb(s) behind the child's back.

(b) Prone and supine restraints except:

(1) As a transitional hold that lasts no longer than one minute;

(2) As a last resort when other less restrictive interventions have proven to be ineffective; and

(3) When an observer meeting the following qualifications ensures the child's breathing is not impaired:

(A) Trained to identify risks associated with positional, compression, or restraint asphyxia;

(B) Trained to identify risks associated with prone and supine holds; and

(C) Not involved in the restraint. General residential operations and residential treatment centers with a capacity of 16 or fewer children are exempt from meeting this requirement.

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DIVISION 6. ADDITIONAL RESPONSIBILITIES DURING ADMINISTRATION OF SECLUSION

40 TAC §748.2651, §748.2653

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 7. ADDITIONAL RESPONSIBILITIES DURING ADMINISTRATION OF A MECHANICAL RESTRAINT

40 TAC §§748.2701, 748.2703, 748.2705

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 8. SUCCESSIVE USE AND COMBINATIONS OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §§748.2751, 748.2753, 748.2755, 748.2757

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 9. TIME RESTRICTIONS FOR EMERGENCY BEHAVIOR INTERVENTION

40 TAC §§748.2801, 748.2803, 748.2805, 748.2807

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 10. GENERAL CAREGIVER RESPONSIBILITIES, INCLUDING DOCUMENTATION, AFTER THE ADMINISTRATION OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §§748.2851, 748.2853, 748.2855

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2851. What follow-up actions must caregivers take after the child's behavior no longer constitutes an emergency situation?

(a) The caregivers must take appropriate actions to help the child return to routine activities. The follow-up actions of the caregivers must include:

(1) Providing the child with an appropriate transition and offering the child an opportunity to return to regular activities;

(2) Observing the child for at least 15 minutes; and

(3) Providing the child with an opportunity to discuss the situation that led to the need for emergency behavior intervention and the caregiver's reaction to that situation. The discussion must be held in private as soon as possible and no later than 48 hours after the child's use of an emergency medication or release from any emergency behavior intervention.

(b) Caregivers involved in the emergency behavior intervention must conduct a post-emergency behavior intervention discussion with the child. The goal of the discussion is to allow the child and caregiver to discuss:

(1) The child's behavior and the circumstances that constituted the need for an emergency behavior intervention;

(2) The strategies attempted before the use of the emergency behavior intervention and the child's reaction to those strategies;

(3) The emergency behavior intervention itself and the child's reaction to the emergency behavior intervention;

(4) How caregivers can assist the child in regaining self-control in the future to avoid the administration of an emergency behavior intervention; and

(5) What the child can do to regain self-control in the future to avoid the administration of an emergency behavior intervention.

(c) Caregivers involved in the emergency behavior intervention must:

(1) Debrief with each other concerning the incident as soon as possible after the situation has stabilized; and

(2) Make reasonable efforts to debrief with children in care who witness the incident.

(d) The supervisor(s) of the caregivers involved in the emergency behavior intervention must review the use of the emergency behavior intervention within 72 hours of the intervention.

(e) The caregivers do not have to return the child to previous activities or place the child in current activities that the group is participating in if the caregivers deem the child's participation is not in the best interests of the child or the other children in the group. However, caregivers must engage the child in an alternative routine activity.

(f) This rule does not apply to the following types of emergency behavior intervention:

(1) Short personal restraint; and

(2) Seclusion, if the child is receiving emergency care services.

§748.2853. What must the caregiver document after discussing with the child the use of the emergency behavior intervention?

(a) The date and time the caregiver offered the discussion;

(b) The child's reaction to the opportunity for discussion;

(c) The date and time the discussion took place, if applicable; and

(d) The content of the discussion, if applicable.

§748.2855. When must a caregiver document the use of an emergency behavior intervention, and what must the documentation include?

(a) As soon as possible, but no later than 24 hours after the initiation of the intervention, the caregiver must document in the child's record the following information:

(1) The child's name;

(2) The basis for the emergency behavior intervention;

(3) A description and assessment of the circumstances and specific behaviors that caused the basis for the emergency behavior intervention;

(4) The de-escalation attempted before and during the use of the emergency behavior intervention and the child's reaction to those strategies;

(5) The specific emergency behavior intervention administered;

(6) The date and time the intervention was administered;

(7) The length of time the child was restrained or secluded;

(8) The name of the caregiver(s) that participated in the incident that led to the intervention, and who administered the intervention;

(9) The name of the person(s) who observed the child;

(10) The duration of the emergency behavior intervention;

(11) All attempts to explain to the child what behaviors were necessary for release from the intervention;

(12) The child's condition following the use of the medication or release from the intervention, including any injury the child sustained as a result of the intervention or any adverse effects caused by the use of the intervention; and

(13) The actions the caregiver(s) took to facilitate the child's return to normal activities following the end of the intervention.

(b) Supervisors of caregivers involved in emergency behavior intervention of a child must document their review of the use of the intervention within 72 hours of the incident.

(c) If personal restraint is used, documentation must also include the specific restraint techniques used, including a prone or supine restraint used as a transitional hold.

(d) If emergency medication is used, documentation must also include the specific medication used and the dosage administered to the child.

(e) If mechanical restraint is used, documentation must also include:

(1) The specific restraint device used; and

(2) Continuous observation and regular respiration and circulation checks and times the checks were conducted.

(f) This rule does not apply to short personal restraints.

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DIVISION 11. TRIGGERED REVIEWS

40 TAC §§748.2901, 748.2903, 748.2905, 748.2907, 748.2909

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2907. What must the triggered review include and what must be documented in the child's record?

The following must be included in a triggered review and documented in the child's record:

(1) The same items that must be included and documented in an initial service plan (see §748.1337 of this title (relating to What must a child's initial service plan include?));

(2) A review of the records and orders of the emergency behavior interventions;

(3) A review and documentation of any potential medical or psychiatric reason for not using emergency behavior interventions on the child, including the prescribing professional's consideration of any potential medical and/or psychiatric contraindications for the specific child, such as a history of physical or sexual abuse or victimization involving the type of intervention;

(4) An examination of alternatives to manage the child's behavior and to assist the child in managing his own behavior; and

(5) A written plan for reducing the need for emergency behavior intervention.

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DIVISION 12. OVERALL OPERATION EVALUATION

40 TAC §748.2951, §748.2953

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.2953. What data must be collected?

(a) Quarterly, you must collect, document, and review aggregate numbers of emergency behavior interventions by type of intervention, with the exception of short personal restraints.

(b) This information must be reported to us quarterly.

(c) You must maintain the data for five years.

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SUBCHAPTER O. SAFETY AND EMERGENCY PRACTICES
DIVISION 1. SANITATION AND HEALTH PRACTICES

40 TAC §§748.3001, 748.3003, 748.3005, 748.3007, 748.3009, 748.3011, 748.3013, 748.3015, 748.3017, 748.3019, 748.3021

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3017. Are animals allowed at my operation?

(a) Yes; if:

(1) You keep the operation and premises free of stray animals.

(2) You do not allow children to play with stray animals or other animals that could be dangerous.

(3) You have documentation at your operation showing dogs, cats, and ferrets have been vaccinated as required by Texas Health and Safety Code, Chapter 826.

(4) All animals on the premises, including pets and livestock, are treated according to a licensed veterinarian's recommendations to protect the health and safety of children. If you choose to have animals on the premises, you must ensure that the animals do not create health problems or a health risk for children.

(b) For therapeutic camp services, you must house horses and other animals that you maintain at a camp at a reasonable distance from any sleeping, living, eating, or food preparation area.

§748.3021. How must I protect children from dangerous tools and equipment?

Dangerous tools and equipment, such as hatchets, saws, and axes must be stored, so they are inaccessible to children. Children may use these

tools and equipment with caregiver supervision, as appropriate based on the child's age, maturity, and treatment issues.

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DIVISION 2. NATURAL GAS AND LIQUEFIED PETROLEUM

40 TAC §§748.3061, 748.3063, 748.3065

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3061. When must my operation be inspected for gas leaks?

Your operation must be inspected for gas leaks:

(1) Before we issue your initial permit; and

(2) At least once every 24 months from the date of the last inspection for gas leaks.

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DIVISION 3. FIRE SAFETY PRACTICES

40 TAC §§748.3101, 748.3103, 748.3105, 748.3107, 748.3109, 748.3111, 748.3113, 748.3115, 748.3117, 748.3119

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3103. Who must conduct a fire inspection?

(a) A state or local fire inspector must conduct the inspection.

(b) If an inspector cannot conduct an inspection, you must provide documentation of this from a state or local fire inspector or county judge.

§748.3105. What documentation must I maintain regarding a fire inspection?

(a) You must keep the most recent fire-inspection report, letter, or checklist at the operation to verify the inspection date and findings. The report must include the inspector's name and telephone number.

(b) You must comply with the local code and all corrections, restrictions, or conditions specified by the inspector in the fire-inspection report, letter, or checklist.

§748.3107. What type of smoke-detection system must I have?

(a) Your operation must have an operable smoke-detection system that is audible throughout the building. This may be:

(1) An electronic fire alarm and smoke-detection system; or

(2) Individual electric or battery-operated smoke detectors located according to the state or local fire inspector's recommendations. If no fire inspector is available or able to give recommendations, smoke detectors must be located in the following areas:

(A) In hallways or open areas outside sleeping rooms; and

(B) On each level of a building with multiple levels.

(b) Depending on the size and layout of the operation, additional smoke detectors may be required based on manufacturer's or fire inspector's instructions.

(c) New operations granted a permit by us on or after January 1, 2007, must have smoke detectors that get their power from building wiring from a commercial source. Wiring must be permanent. Smoke detectors must:

(1) Be equipped with a battery back-up; and

(2) Emit a signal when the batteries are low.

§748.3109. How must smoke detectors be installed at my operation?

(a) Smoke detectors must be installed and maintained according to the manufacturer's instructions or in compliance with the state or local fire inspector's instructions.

(b) Batteries must be changed annually or sooner, as required to maintain operable smoke detector units.

§748.3111. How often must the smoke detectors at my operation be tested?

(a) The administrator or designee must test all battery-operated smoke detectors monthly by pressing the test button or switch on

the unit. The date of the test and the name of the employee who does the testing must be documented and kept at the operation for review.

(b) A company licensed by the State Fire Marshal, or the state or local fire inspector, must test an electronic smoke alarm system at least annually. You must keep documentation of the inspection at the operation for review. The documentation must indicate the date of the inspection and the inspector's name and telephone number.

§748.3113. Must my operation have a fire-extinguishing system?

(a) Your operation must have a fire-extinguishing system, which may be a sprinkler system and/or fire extinguishers.

(b) The state or local fire inspector must approve the sprinkler system and/or fire extinguishers in your operation. If an inspector cannot conduct an inspection, you must have at least one fire extinguisher in the operation rated not less than 3A:40BC.

(c) Any fire extinguisher that has been used or has lost operating pressure must be serviced or replaced immediately with an equivalent unit.

§748.3115. How often must I inspect and service the fire extinguisher(s)?

You must inspect the fire extinguisher(s) monthly and ensure:

(1) There will be no interference with access to the extinguisher in an emergency, for example, there are no objects blocking access;

(2) Fire extinguishers are accessible for immediate use by employees, caregivers, and volunteers; and

(3) Fire extinguishers are serviced as required by manufacturer's instructions, or as required by the state or local fire inspector.

§748.3117. How often must the state or local fire inspector inspect fire extinguisher(s)?

(a) A company licensed by the State Fire Marshal must inspect each fire extinguisher at least annually and conduct any required service or testing. Newly purchased fire extinguishers do not require inspection during the first 12 months of service unless indicated by the monthly inspection.

(b) You must keep documentation of the inspection and/or the purchase of new fire extinguishers at the operation for review. The documentation must indicate the date of the inspection and the inspector's name.

§748.3119. How often must a fire sprinkler system be inspected?

(a) If your operation has a fire sprinkler system, a company licensed by the State Fire Marshal must inspect the fire sprinkler system at least annually and conduct any required service or testing.

(b) You must keep the most recent inspection report at the operation for review. The documentation must indicate the date of the inspection and the inspector's name and telephone number.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. HEATING DEVICES

40 TAC §748.3161

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.3161. What steps must I take to ensure that heating devices do not present hazards to children?

(a) Gas appliances must have metal tubing and connections, be in good repair, and free from leaks.

(b) Space heaters must be enclosed and have the seal of approval of a United States test laboratory or be approved by the state or local fire inspector.

(c) You must safeguard floor and wall furnace grates, steam and hot water pipes, and electric space heaters, so children do not have access to them.

(d) Gas fuel heaters, fireplaces, and wood-burning stoves must be properly vented to the outside.

(e) If you use a fireplace, wood-burning stove, or space heater, you must install a screen or guard with sufficient strength to prevent children from falling into the fire or against the stove or heater.

(f) You must keep fireplaces and wood-burning stoves clean.

(g) You may not use any of the following in your operation:

(1) Stoves, including portable camp stoves, used to heat any part of the operation;

(2) Open flame heaters (heaters where the flame can be easily touched or accessed); or

(3) Liquid fuel heaters.

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DIVISION 5. CARBON MONOXIDE SAFETY PRACTICES

40 TAC §§748.3191, 748.3193, 748.3195

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3193. How must carbon monoxide detectors be installed?

(a) You must install carbon monoxide detectors that meet Underwriters Laboratories Inc. requirements (UL-Listed).

(1) You must install carbon monoxide detectors according to manufacturer's specifications for proper location and installation; and

(2) Furniture, draperies, or other items must not cover up detectors.

(b) If you use an electronic carbon monoxide detection-system connected to an alarm/smoke detection system, the system must be installed according to the state or local fire inspector's requirements.

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DIVISION 6. EMERGENCY EVACUATION AND RELOCATION

40 TAC §§748.3231, 748.3233, 748.3235, 748.3237, 748.3239

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3233. Must I have an emergency evacuation and relocation diagram?

(a) You must have a written emergency evacuation and relocation diagram specifying directions for egress on file at your operation.

(b) The emergency evacuation and relocation diagram must show the following:

(1) A floor plan of your operation;

(2) The designated location outside of the operation where all caregivers and children meet to ensure everyone has exited the operation safely;

(3) The designated location inside the operation where all caregivers and children take shelter from threatening weather; and

(4) At least two exit routes that:

(A) Are located in distant parts of the building and lead to the outside;

(B) Are not blocked in any way, including with furniture or equipment;

(C) Are not through a kitchen or other hazardous area, unless specifically approved in writing by the state or local fire inspector. The written approval must be signed and dated by the state or local fire inspector and maintained at your operation for our review;

(D) Are not a window, unless children and caregivers are physically able to exit through the window to the ground outside safely and quickly;

(E) Are not doors or windows that are locked and require a key to open from the inside, unless specifically approved in writing by the state or local fire inspector. The written approval must be signed and dated by the state or local fire inspector and maintained at your operation for our review;

(F) Do not lead into a pool area; and

(G) If above the ground level, are served by standard stairs and do not require ladders, folding stairs, or trap doors to gain access to the ground floor.

§748.3237. What other safety provisions must I make?

(a) Closet door latches must allow children to open the door from the inside of the closet.

(b) In case of electrical failure, you must have an operable source of emergency lighting that is approved by the state or local fire inspector, or operable battery-powered lighting.

(c) Children must be able to open emergency exit doors easily from the inside, unless specifically approved in writing by the state or local fire inspector. The written approval must be signed and dated by the state or local fire inspector and maintained at your operation for our review.

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DIVISION 7. FIRST-AID KITS

40 TAC §748.3271, §748.3273

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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SUBCHAPTER P. PHYSICAL SITE
DIVISION 1. GROUNDS AND GENERAL REQUIREMENTS

40 TAC §§748.3301, 748.3303, 748.3305, 748.3307, 748.3309, 748.3311, 748.3313, 748.3315, 748.3317

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The new sections implement HRC, §42.042.

§748.3301. What general physical site requirements must my operation meet?

(a) Buildings, including exterior and interior surfaces (such as walls, floors, and ceilings), must be structurally sound, clean, and in good repair. Paints used at the operation after January 1, 2007, must be lead-free.

(b) Buildings must comply with applicable building, plumbing, electrical, fire, and similar codes.

(c) Windows and doors must be in good repair and free of broken glass or hazards. Windows used for ventilation, including windows in doors, must be provided with properly fitted and secure screens in good repair for protection from insects when windows are open.

(d) Walkways must be free of ice, snow, and obstruction.

(e) Outdoor areas must be well drained.

(f) The grounds of the operation must be well maintained and free of hazards.

(g) The grounds of the operation must be free of accumulation of garbage and debris and maintained in a sanitary manner. All garbage must be disposed of in a sanitary manner in accordance with the Texas Commission on Environmental Quality (see 30 TAC Chapter 330, Municipal Solid Waste). Outdoor garbage cans must have lids.

(h) The building must be free of rodents and insects.

(i) Equipment and furniture must be safe for children and must be kept clean and in good repair.

§748.3303. What parts of my operation must be ventilated?

Living quarters, recreation areas, dining areas, bathrooms, bedrooms, and kitchens must be adequately ventilated by at least one operable window or mechanical ventilation system.

§748.3311. What are the requirements for using a tractor?

You must never permit a child:

(1) Under 16 years old to operate a tractor; or

(2) To ride as a passenger on a tractor.

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DIVISION 2. INTERIOR SPACE

40 TAC §§748.3351, 748.3353, 748.3355, 748.3357, 748.3359, 748.3361, 748.3363, 748.3365, 748.3367, 748.3369

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3351. What are the requirements for general living space?

You must provide:

(1) Us with a sketch of the operation's floor plan showing the dimensions and the purpose of all rooms and specifying where children and caregivers, if applicable, will sleep. This must be provided to us with the initial application for a permit and when changes are made;

(2) Living space, appropriate furnishings, and bathroom facilities that are safe, clean, and maintained in good repair;

(3) Provisions for personal storage space in the child's bedroom for each child's clothing and belongings;

(4) At least 40 square feet per child, including adult residents and children of caregivers residing at the operation, of indoor activity space, excluding bedrooms, halls, kitchens, bathrooms, and any other space not regularly available to a child;

(5) Each bedroom with at least one window with outside exposure as a source of natural light, unless you were granted a permit by us prior to January 1, 2007, and your permit is still valid; and

(6) Every bedroom window with curtains, blinds, shades, or other provisions for rest and privacy.

§748.3353. May I use a video camera to supervise a child in the child's bedroom?

(a) Video cameras may be used to supervise infants and toddlers.

(b) Video cameras may not be used to supervise children, other than infants and toddlers unless the:

(1) Parent, or other person legally authorized to consent, consents to the use of the video camera; and

(2) Child:

(A) Is younger than five years old;

(B) Has primary medical needs; or

(C) Requires heightened supervision, such as a child who sleepwalks, experiences night terrors, engages in physically aggressive or sexual behavior problems, or resides in a bedroom with such a child. You must document the justification for the video camera in each child's service plan, and each child must have other accessible and reasonable locations where he may change his clothing in private.

(c) Video cameras may not be used to tape the child, and images may not be accessible except to operation employees and caregivers.

§748.3355. May I use an audio monitoring device to supervise a child in the child's bedroom?

(a) Audio monitoring devices may be used to supervise infants and toddlers.

(b) Audio monitoring devices may not be used to supervise other children, except infants and toddlers, unless the:

(1) Parent, or other person legally authorized to consent, consents to the use of the audio monitoring device; and

(2) Child:

(A) Is younger than five years old;

(B) Has primary medical needs; or

(C) Requires heightened supervision, such as a child who sleepwalks, experiences night terrors, engages in physically aggressive or sexual behavior problems, or resides in a bedroom with such a child. You must document the justification for the audio monitoring device in each child's service plan.

§748.3359. What rooms may I not use as bedrooms?

You may not use the following as bedrooms:

(1) Rooms commonly used for other purposes, such as dining rooms, living rooms, hallways, porches or dens, except for a child temporarily requiring close supervision or a child who is admitted to your operation during sleeping hours (for the first night only). These exceptions are permitted only if the child is provided with comfortable sleeping arrangements and if supervision of the child is not compromised;

(2) Rooms that are passageways to other rooms; or

(3) Basements; however, if prior to January 1, 2007, we granted you a permit, then basements may be used as bedrooms as long as other relevant requirements are met, and until:

(A) You move your operation to a new building;

(B) You structurally alter the current building by adding a new room; or

(C) Your permit is no longer valid.

§748.3361. May a child in care share a bedroom with an adult?

(a) Generally, each child should have his own designated bedroom or share a bedroom with other children.

(b) A child may share a bedroom with an adult if:

(1) It is in the best interest of the child;

(2) The child is under three years old and sleeps in the bedroom of the caregiver; and

(3) Approval is documented and dated in the child's service plan by the service planning team.

(c) To determine whether a child should share a bedroom with an adult resident, see §748.1937 of this title (relating to May an adult resident share a bedroom with a child resident?).

(d) This rule does not apply to travel and camping situations.

§748.3363. Can children of the other gender share a bedroom?

(a) A child six years old or older may not share a bedroom with a person of the other gender. Prior to permitting a child under six years old to share a bedroom with a person of the other gender, the service planning team must assess:

(1) What is in the best interest of the child;

(2) The history of these persons for possible sexual abuse and/or sexual behavior problems; and

(3) The appropriateness.

(b) The assessment and approval by the service planning team must be documented and dated in the child's record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. TOILET AND BATH FACILITIES

40 TAC §§748.3391, 748.3393, 748.3395, 748.3397, 748.3399

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3393. What are the requirements for a toilet that a child uses?

(a) Your operation must dispose of wastewater into a sanitary sewage system, or an approved septic system in accordance with the Texas Commission on Environmental Quality, including any routine inspections required by law.

(b) You must provide:

(1) At least one toilet for every eight children. All toilets must provide individual privacy, including doors to individual toilet stalls; and

(2) Separate toilet facilities for males and females.

(c) When toilet facilities for each gender are located in the same building, the toilet facilities must be:

(1) Distinctly marked for each gender; and

(2) Separated by a solid wall from floor to ceiling.

(d) Toilets must be equipped with toilet paper at all times.

(e) Toilet facilities must meet the handicap accessibility standards according to the American with Disabilities Act, if applicable.

(f) Urinals may be substituted for the toilets for the males on a ratio of one urinal or 24 inches of trough-type urinal for one toilet, not to exceed one-third of the required toilets. Urinals must have privacy walls on three sides that must be constructed of nonabsorbent materials.

§748.3395. What are the requirements for hand-washing sinks that a child uses?

(a) You must maintain all hand-washing sinks in good repair and keep them clean at all times.

(b) You must provide:

(1) At least one hand-washing sink for every eight children;

(2) A hand-washing sink that is adjacent to toilet facilities;

(3) Hand-washing sinks with hot and cold running water under sufficient pressure to meet the demands of the children; and

(4) Hand-washing sinks equipped with soap and a personal towel, single-use disposable towels, or hot air hand dryers.

§748.3397. What are the requirements for bathing facilities?

(a) All bath and shower areas must provide for individual privacy. This includes doors or nonabsorbent shower curtains to individual bathtubs and showers stalls.

(b) You must provide:

(1) At least one bathtub or shower for every eight females and one for every eight males; and

(2) Separate shower and bath facilities for each gender, where applicable.

(c) When common-use shower facilities for each gender are located in the same building, the facilities must be:

(1) Distinctly marked for each gender; and

(2) Separated by a solid wall from the floor to ceiling.

(d) Each shower and bathtub must be equipped with:

(1) Hot and cold running water under sufficient pressure to meet the demands of the children; and

(2) Sufficient hot water to meet the demands of the children.

(e) If prior to January 1, 2007, we granted you a permit, then you do not have to comply with these requirements until:

(1) You move your operation to a new location;

(2) You structurally alter the current bathroom facilities; or

(3) Your permit is no longer valid.

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DIVISION 4. POISONS

40 TAC §748.3421

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 5. FOOD PREPARATION, STORAGE, AND EQUIPMENT

40 TAC §748.3441, §748.3443

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3441. What general requirements apply to food service and preparation?

(a) All food and drinks must be of safe quality and must be stored, prepared, distributed, and served under sanitary and safe conditions.

(b) You must sanitize food service equipment, dishware, and utensils after each use. All eating and cookware must be properly stored.

(c) You must keep furniture, equipment, food contact surfaces, and other areas where food is prepared, eaten, or stored clean and in good repair.

(d) If your operation lacks adequate facilities for sanitizing dishes and utensils, you must only use disposable, single-use items.

(e) You must discard single-service napkins, bibs, dishware, containers, and utensils after each use.

(f) You must wash re-useable napkins and bibs after each use.

(g) You must wash re-useable tablecloths when soiled.

(h) Persons who handle food and/or eating utensils for the group must:

(1) Maintain personal cleanliness;

(2) Keep hands clean at all times;

(3) Wash his hands with soap and water thoroughly after each visit to the toilet;

(4) Be free of infections commonly transmitted through the handling of food or drink and free of communicable diseases; and

(5) Minimize food contamination through the use of utensils.

(i) Food packages must be in good condition and protect the integrity of the contents, so food is not exposed to adulteration or potential contaminants. You must discard cans that are leaking, bulging, or rusted.

(j) When you serve an infant or toddler:

(1) If the child is capable of sitting up, you must serve food on plates, napkins, or other sanitary holders, such as a high chair tray; and

(2) You must not serve foods that present a risk of choking.

(k) When you prepare a meal at the operation, the food preparation area must be in a separate space from the eating, play, and bathroom areas.

(l) Fruits and vegetables must be properly washed before use.

(m) Food must be thawed in the refrigerator, in cold water in a leak-proof bag, or in the microwave.

(n) Food must be protected from contamination.

(o) You must keep raw meat, poultry, fish, and their juices away from other food. After cutting raw meat, you must wash your hands, the cutting board, the knife, and the countertops with hot, soapy water. You must sanitize cutting boards by using a solution of one-teaspoon chlorine bleach in one quart of water.

(p) You must maintain hot food at 140 degrees Fahrenheit or above.

(q) You must refrigerate perishable food at proper temperatures:

(1) Within one hour after use when the temperature is above 90 degrees Fahrenheit; or

(2) Otherwise, within two hours.

(r) Uneaten food from a person's plate must not be served again or used in the preparation of other dishes.

(s) You must not permit animals to be in the area of food storage, food preparation, and dining.

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DIVISION 6. PLAY EQUIPMENT AND SAFETY REQUIREMENTS

40 TAC §§748.3471, 748.3473, 748.3475, 748.3477, 748.3479, 748.3481

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3471. What are the minimum safety requirements for outdoor equipment?

You must ensure that outdoor equipment and supplies used both at and away from the operation are safe for the children as follows:

(1) The outdoor activity space must be arranged, so caregivers can adequately supervise children at all times.

(2) The design, scale, and location of the equipment must be appropriate for the body size and ability of the children using the equipment.

(3) Equipment must not have openings that can entrap a child's body or body part that has penetrated the opening.

(4) Equipment must not have protrusions or openings that can entangle something around a child's neck or a child's clothing.

(5) Equipment must be securely anchored according to manufacturer's specifications to prevent collapsing, tipping, sliding, moving, or overturning.

(6) All anchoring devices must be placed below the level of the playing surface to prevent tripping or injury resulting from a fall.

(7) Equipment must not have exposed pinch, crush, or shear points on or underneath it.

(8) You must not install climbing equipment, swings, or slides over asphalt or concrete, unless the asphalt or concrete is covered with properly installed unitary surfacing materials as specified in this subchapter.

(9) Outdoor platforms more than 20 inches in height for children five years old and younger, and more than 30 inches in height for school-age children, must be equipped with guardrails that surround the elevated surface, except for entrances and exits, and that prevent children from crawling over or through the guardrail.

(10) The height of the highest play surface or platform cannot be more than eight feet.

(11) Stairs and steps on outdoor climbing equipment, regardless of height, must have well-secured handrails on both sides of stairs and steps that the children can reach. Rung ladders do not require handrails.

(12) Bounce houses are permitted if used by no more than one child at a time.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 7. PLAYGROUND USE ZONES

40 TAC §§748.3521, 748.3523, 748.3525, 748.3527, 748.3529, 748.3531, 748.3533, 748.3535

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 8. PROTECTIVE SURFACING

40 TAC §§748.3561, 748.3563, 748.3565, 748.3567

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 9. SWIMMING POOLS, WADING/SPLASHING POOLS, AND HOT TUBS

40 TAC §§748.3601, 748.3603, 748.3605, 748.3607

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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SUBCHAPTER Q. RECREATION ACTIVITIES

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §§748.3701, 748.3703, 748.3705, 748.3707, 748.3709, 748.3711, 748.3713, 748.3715, 748.3717, 748.3719

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3701. What are my responsibilities for providing opportunities for recreational activities and physical fitness?

(a) You must provide daily indoor and outdoor recreational and other activities appropriate to the needs, interests, and abilities of the children, so every child may participate.

(b) You must have a written plan for ensuring that a range of indoor and outdoor recreational and leisure opportunities are provided for children in care.

(c) Except for a child who has written medical orders to the contrary, your programs for non-ambulatory children must include:

(1) Physical fitness development that prescribes a variety of body positions; and

(2) Changes in environment.

(d) Each child must have individual free time as appropriate to the child's age and abilities.

(e) You must provide the follow types of recreational activities based on each individual child's needs:
Figure: 40 TAC §748.3701(e)

§748.3717. What instruction must a caregiver have regarding the plan for action?

For a higher risk recreational activity, the person qualified to supervise the activity must instruct caregivers participating in the activity regarding the implementation of the plan of action.

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DIVISION 2. SWIMMING ACTIVITIES

40 TAC §§748.3751, 748.3753, 748.3755, 748.3757, 748.3759, 748.3761, 748.3763, 748.3765, 748.3767

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3751. Must a certified lifeguard be on duty during an activity involving a body of water?

(a) A certified lifeguard must supervise children at all times during an activity involving a body of water two feet deep or more.

(b) You do not need to provide a lifeguard when you are:

(1) Using a public pool for which you are not responsible and the pool provides a qualified lifeguard; or

(2) Involved in watercraft activities, however you must comply with the requirements in Division 3 of this subchapter (relating to Watercraft Activities).

§748.3757. What are the child/adult ratios for swimming activities?

(a) The maximum number of children one adult can supervise during swimming activities is based on the age of the youngest child in the group and is specified in the following chart:
Figure: 40 TAC §748.3757(a)

(b) In addition to meeting the required swimming child/adult ratio listed in subsection (a) of this section, if four or more children are

engaged in swimming activities, then there must be at least two adults to supervise the children.

(c) When a child who is non-ambulatory or who is subject to seizures is engaged in swimming activities, you must assign one adult to that one child. This adult must be in addition to the lifeguard on duty in the swimming area. You do not have to meet this requirement if a licensed physician writes orders in which the physician determines that the child:

(1) Is at low risk of seizures and that special precautions are not needed; or

(2) Only needs to wear an approved life jacket while swimming and additional special precautions are not needed.

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DIVISION 3. WATERCRAFT ACTIVITIES

40 TAC §§748.3801, 748.3803, 748.3805, 748.3807

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3803. What are the requirements for watercraft activities?

(a) A non-swimmer must:

(1) Wear a life vest; and

(2) With the exception of inflatable tubes, not be in a watercraft without an adult.

(b) At least two adults able to swim and carry out a water rescue must be at the shoreline and/or on the water to respond to emergencies any time children are on the water during watercraft activities.

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DIVISION 4. WILDERNESS HIKING AND CAMPING EXCURSIONS

40 TAC §§748.3841, 748.3843, 748.3845, 748.3847, 748.3849, 748.3851, 748.3853, 748.3855, 748.3857, 748.3859, 748.3861

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The new sections implement HRC, §42.042.

§748.3845. What type of itinerary must I have for hiking, camping excursions, or field trips?

(a) For hiking, camping excursions, or field trips that last for over five hours, you must have a day-to-day itinerary prepared prior to departure, including the:

(1) Time of departure and anticipated time of return;

(2) Destination; and

(3) Travel route.

(b) For hiking, camping excursions, or field trips that last overnight, each point of the itinerary must also identify:

(1) Sources of emergency care, such as hospitals, police, and forest service offices;

(2) Methods of communicating with sources of emergency care; and

(3) Date and time of departure and anticipated date and time of return.

(c) The caregivers on the excursion must:

(1) Follow the itinerary as closely as possible; and

(2) Notify the operation of any change, when possible.

§748.3855. What requirements must I meet for food utensils and equipment when camping?

(a) A common use drinking cup, container, or utensil must be washed with uncontaminated hot water and detergent before another person uses it.

(b) You must not use a dish, container, or utensil that is chipped, cracked, broken, damaged, or constructed so as to prevent proper cleaning and sanitizing.

(c) You must discard disposable or single-use dishes, containers, or utensils used in handling food after one use.

(d) You must store eating utensils:

(1) Separately from foods or other materials or substances; and

(2) In clean, dry containers.

§748.3861. What are the requirements for toilet facilities during overnight camping excursions?

(a) If the campsite is not provided with toilet facilities, pit privies or other portable toilets, there must be separate designated areas for each gender for toilet use.

(b) Toilet paper must be available at all times, as needed.

(c) Privies must be located at least:

(1) 20 feet from any stream, lake, well, spring, or other water supply; and

(2) 75 feet from the camp, tent, sleeping, or housing arrangement.

(d) Soap and water for hand washing must be located within 20 feet of the toilet areas.

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DIVISION 5. TRAMPOLINE USE

40 TAC §748.3891, §748.3893

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 6. WEAPONS, FIREARMS, EXPLOSIVE MATERIALS, AND PROJECTILES

40 TAC §§748.3931, 748.3933, 748.3935, 748.3937

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.3931. Are weapons, firearms, explosive materials, and projectiles permitted at my operation?

Generally, weapons, firearms, explosive materials, and projectiles (such as darts or arrows), are permitted, however, there are some specific restrictions:

(1) Handguns are not permitted at an operation or during any type of activity;

(2) A child receiving treatment services or emergency care services is not permitted to use weapons, firearms, explosive materials, or projectiles, or toys that explode or shoot (such as fireworks or BB guns);

(3) If you allow weapons, firearms, explosive materials, projectiles, or toys that explode or shoot, you must develop policies identifying specific precautions to ensure children do not have unsupervised access to them, including locked storage and separate locked storage for the weapons and ammunition;

(4) You must determine it is appropriate for a child receiving only child-care services to use the weapons, firearms, explosive materials, projectiles, or toys that explode or shoot; and

(5) No child may use a weapon, firearm, explosive material, projectile, or toy that explodes or shoots, unless the child is directly supervised by a qualified adult.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. TRANSPORTATION
DIVISION 1. GENERAL REQUIREMENTS

40 TAC §§748.4001, 748.4003, 748.4005, 748.4007, 748.4009, 748.4011, 748.4013

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.4013. What is required when my operation takes children on out-of-state overnight trips?

(a) If your operation takes children on out-of-state overnight trips, you must:

(1) Develop a written itinerary and safety plan for each trip;

(2) Provide necessary equipment and make provisions to meet participants' needs on the trip; and

(3) Inform parents before the planned departure date, and document in the child's record the discussion and date when this contact occurred.

(b) You must obtain the written permission from each child's parent for each out-of-state trip or must obtain a general written permission from each child's parent for any out-of-state trip in which the child will participate.

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DIVISION 2. SAFETY RESTRAINTS

40 TAC §§748.4041, 748.4043, 748.4045, 748.4047

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.4043. Do the seat belt requirements prohibit transporting children in the bed of a pick-up truck?

(a) Children may be transported in the bed of a pick-up truck on the facility grounds if the following conditions are met:

(1) If children are being transported in the bed of a pick-up truck, children must be at least 13 years old;

(2) Children must be seated;

(3) No children may sit on the side of the vehicle, the tire wells, or on the tailgate;

(4) No children may lean against the tailgate;

(5) The tailgate must be securely closed while the vehicle is in motion;

(6) The vehicle must travel at a safe speed consistent with the terrain and weather conditions;

(7) The driver of the vehicle must be knowledgeable about the dangers associated with issues, such as but not limited to, sudden braking and travel over uneven terrain; and

(8) Open bed pick-up trucks or trailers must not be used to transport children on public roads.

(b) Subsection (a) of this section does not apply to hay-rides on trailer beds for special occasions as long as there is adequate adult supervision to prevent children from falling off of the trailer.

(c) At all other times transportation is provided by the operation, employees, or volunteers, each child must be in a safety restraint when the vehicle is in motion.

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DIVISION 3. VEHICLE AND VEHICLE MAINTENANCE

40 TAC §748.4081, §748.4083

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

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DIVISION 4. TRANSPORTATION RECORDS

40 TAC §748.4111

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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SUBCHAPTER S. ADDITIONAL REQUIREMENTS FOR OPERATIONS THAT PROVIDE EMERGENCY CARE SERVICES

DIVISION 1. SERVICE MANAGEMENT

40 TAC §§748.4201, 748.4203, 748.4205, 748.4207, 748.4209, 748.4211, 748.4213

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. ADMISSION ASSESSMENT

40 TAC §748.4231

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§748.4231. What information must an admission assessment include for a child needing emergency care services, including respite child-care services?

(a) An admission assessment must provide an initial evaluation of the appropriate placement of the child and must include:

(1) The child's immediate needs;

(2) The name of the referral source;

(3) The date and time of placement;

(4) The reason for emergency placement;

(5) A description of the child's condition as observed by the intake worker;

(6) The child's understanding of the need for emergency care services; and

(7) The child's feelings about the crisis situation and operation care.

(b) You must also obtain the following information as soon as possible after admission:

(1) The child's identity, date of birth, and any additional information needed to determine the child's ability to consent to emer-

gency care services for the child or the child's offspring. To consent to services, the child must be:

(A) The parent of a child;

(B) Pregnant; or

(C) 16 years old or older; and

(i) Residing separate and apart from the child's parent, regardless of whether the parent consents to the admission and duration; and

(ii) Managing his own financial affairs, regardless of the source of income;

(2) Name, address, and telephone number of the child's parents, if available. This information is not required if the child meets the requirements to consent to emergency care services;

(3) Medications the child is taking;

(4) Chronic health conditions, such as asthma or diabetes; and

(5) Allergies to medication or food.

(c) If you cannot obtain the required information for an assessment:

(1) You must make reasonable efforts to obtain all required information.

(2) If attempting to get information at the time of placement would not be in the child's best interests, you may postpone attempting to acquire the information.

(3) In the child's admission assessment, you must document why a:

(A) Particular piece of information is unavailable; or

(B) Delay in obtaining a piece of information is necessary, including efforts made to obtain the information.

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DIVISION 3. RESPITE CHILD-CARE SERVICES

40 TAC §§748.4261, 748.4263, 748.4265, 748.4267, 748.4269

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§748.4261. May I provide respite child-care services?

(a) Respite child-care services are not subject to regulation under this subchapter, if the:

(1) Respite child-care services are completely separate from the emergency care services. You must provide the respite child-care services in a completely separate physical space using different caregivers from the caregivers for the emergency care services; and

(2) Care does not exceed 40 days per year as outlined in §745.117(6) of this title (relating to Which programs of limited duration are exempt from Licensing regulation?).

(b) An operation that only provides emergency care services to children may provide respite child-care services, if you:

(1) Meet all applicable requirements for all services, including children admitted only for respite child-care. This includes compliance with capacity limits, child/caregiver ratios, and supervision rules; and

(2) Ensure that your respite child-care services do not present a conflict of care for any child receiving emergency care services.

§748.4263. Whom must I notify when I accept a child for respite child-care?

You must notify the child's parent before accepting the child for respite child-care.

§748.4265. What information regarding a child must I receive prior to providing respite child-care services to that child?

To ensure continuity of care, you must obtain the following information:

(1) Specific needs of a child, including:

(A) All psychiatric or medical treatment currently being provided;

(B) Medication regimen and medication instructions;

(C) Authorization for medical treatment; and

(D) Any other needs of a child that should be addressed by the respite child-care services provider;

(2) Non-routine events taking place in the life of the child;

(3) Emergency contact information, including the:

(A) Child's physician(s);

(B) Child's parent; and

(C) Telephone number of the agency or operation that placed the child; and

(4) The child's history that may affect the operation's ability to provide care for the child, including:

(A) Background of abuse and/or neglect;

(B) Physical aggression or sexual behavior problems;

(C) Fire setting;

(D) Maiming or killing animals;

(E) Suicidal ideations and attempts; and

(F) Run-away behaviors.

§748.4267. How long may a child be in respite child-care?

(a) With the exception of subsection (b) of this section, a child may be in respite child-care for 14 consecutive days or 40 days each year.

(b) A respite child-care services placement that is made because a child's foster home is under investigation for abuse or neglect does not count toward nor is it limited by the time frames noted in subsection (a) of this section. However, these placements are limited to a maximum of 60 days.

(c) If a child needs respite child-care for more than 14 consecutive days or more than 60 days for an abuse or neglect investigation, this is considered a new placement and will not be respite child-care.

(d) When a child finishes a respite child-care placement, he may not return to respite child-care for at least 10 days.

(e) Respite child-care must not be used if it could be detrimental to the child.

§748.4269. May I update an admission assessment when I provide respite child-care services to a child to whom I have already provided respite child-care?

When you admit into your respite child-care services program a child to whom you have already provided respite child-care, you may update the existing admission assessment information rather than completing a new assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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SUBCHAPTER T. ADDITIONAL REQUIREMENTS FOR OPERATIONS THAT PROVIDE AN ASSESSMENT SERVICES PROGRAM

DIVISION 1. REGULATION

40 TAC §748.4301

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042 and §42.0425.

§748.4301. Does Licensing regulate all assessment services?

(a) No. This subchapter only regulates general residential operations and residential treatment centers that also provide an assessment services program.

(b) Services provided by other individuals, agencies, and organizations are not subject to regulation under this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. ADMISSION

40 TAC §748.4331

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042 and §42.0425.

§748.4331. What are the requirements for approving a child's admission into my assessment services program?

(a) The person responsible for the assessment services program must review and approve in writing the determination that your program will be able to provide or obtain all assessment services the child appears to need at intake.

(b) The review, determination, and approval must be:

(1) In writing, signed, and dated from the person responsible for the assessment services program; and

(2) Completed prior to the admission of the child into your assessment services program.

(c) The determination on the appropriateness of the program to meet the child's assessment needs must be filed in the child's record if the child is admitted into your assessment services program.

(d) You must document in the child's record whether you are:

(1) Only providing assessment services to the child; or

(2) Also providing other services, such as emergency care services.

(e) You must document in the child's record the date of the child's admission into your assessment services program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. ASSESSMENT PLAN

40 TAC §§748.4361, 748.4363, 748.4365, 748.4369, 748.4371

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.0425.

§748.4361. When must I complete the child's individual plan for the assessment?

(a) You must complete the child's individual plan for the assessment within 10 days from the date of the child's admission into the program.

(b) You must document the plan in the child's record.

§748.4365. What must an individual plan for the assessment include?

(a) An individual plan for the assessment must include:

(1) Time frames for providing all assessment services;

(2) Recommendations for the child's care during the assessment process;

(3) Any treatment to be provided during the assessment period; and

(4) Current data from the caregiver's evaluation of the child's behavior and level of functioning.

(b) The common application is not and must not serve as the individual plan for the assessment.

§748.4369. How must my assessment services program collect information from a child's caregivers?

(a) Your assessment services program must systematically collect information from caregivers throughout the child's participation in the assessment services program. This information includes the caregivers' observations and opinions of the child.

(b) You must document this information in the child's record. Your documentation must include your consideration of the caregivers' observations and opinions.

§748.4371. When is the plan for the assessment complete?

(a) The plan for the assessment is complete when it contains the necessary information and the signed approval of the person responsible for the assessment services program or a designated employee who meets the qualifications of a person responsible for the assessment program.

(b) The parent must review and be provided a copy of the plan for the assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. ASSESSMENT REPORT

40 TAC §§748.4391, 748.4393, 748.4395, 748.4397

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.0425.

§748.4397. Who must review and approve an assessment report?

(a) The following people must review the assessment report:

(1) The person responsible for the assessment program or a designated employee who meets the qualifications of a person responsible for the assessment program;

(2) The child's primary caregiver; and

(3) The child's parent.

(b) The person responsible for the assessment program, or the designated qualified employee, must approve and sign the report.

(c) You must file the original, approved and signed assessment report, including any addendums to the report, in the child's record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER U. ADDITIONAL REQUIREMENTS FOR OPERATIONS THAT PROVIDE THERAPEUTIC CAMP SERVICES

DIVISION 1. DEFINITIONS

40 TAC §748.4401, §748.4403

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.0425.

§748.4401. What do certain words mean in this subchapter?

These words have the following meanings in this subchapter:

(1) Permanent camp--The permanent structure at which the basic needs for camp operation, such as resident housing, water supply and septic systems, and permanent toilet and/or cooking facilities, are provided.

(2) Permanent structure--Man-made permanent or semi-permanent structures in which groups of people live, eat, sleep, or assemble, such as dining halls, dormitories, cabins, or other structures which are not constructed to be readily movable.

(3) Primitive camp--A portion of the permanent campsite premises or another site at which the basic needs for camp operation, such as water supply systems, and permanent toilet and/or cooking facilities or other permanent structures, are not provided and in which a child stays no longer than 14 days before returning to the permanent camp.

§748.4403. What children are eligible to participate in a therapeutic camp program?

(a) For a child to be eligible to participate in a therapeutic camp program, the child must:

(1) Be 13 years old or older;

(2) Be in need of treatment services for an emotional disorder; and

(3) Have difficulty functioning in his home, school, or community.

(b) Individuals that are not eligible to participate in a therapeutic camp program include:

(1) An adult;

(2) A child under 13 years old;

(3) A child who receives child-care services only, including a child in a transitional living services program;

(4) A child who is pregnant. If a child becomes pregnant while in care, you must arrange for the child's immediate discharge or transfer from your therapeutic camp program;

(5) An adolescent parent with his or her child;

(6) A child with primary medical needs or other medical conditions that cannot be easily provided to the child at the permanent campsite or during primitive camping excursions;

(7) A child diagnosed with a Pervasive Developmental Disorders such as Autistic Disorder, Asperger's Disorder and Rett's Disorder;

(8) A child diagnosed with Mental Retardation;

(9) A child for an emergency admission; and

(10) A child for child day care services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. ACTIVITIES REQUIRING SPOTTING OR BELAYING

40 TAC §748.4431

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042 and §42.0425.

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DIVISION 3. PRIMITIVE CAMPING EXCURSIONS

40 TAC §§748.4461, 748.4463, 748.4465, 748.4467, 748.4469, 748.4471, 748.4473

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.0425.

§748.4465. What child/caregiver ratios apply to a primitive camping excursion?

(a) In addition to meeting the child/caregiver ratio requirements in Subchapter G of this chapter (relating to Child/Caregiver Ratios), you must have at least two caregivers during any primitive camping excursion.

(b) In a mixed gender group, there must be a caregiver of each gender at all times.

§748.4469. What are the requirements for sanitizing hands at a primitive campsite?

(a) Children and employees must sanitize their hands.

(b) At least one of the following methods for sanitizing hands must be available at the campsite:

(1) Bathrooms equipped with running water must always have soap available for use within 20 feet of the toilet areas;

(2) A hand-washing sink using a portable water supply must have a sanitary catch system approved by your local health department and must always have antibacterial liquid soup or an alcohol-based hand sanitizer available for use:

(A) You must follow label directions when using alcohol-based hand sanitizers; and

(B) Children must not have access to soiled water; or

(3) Privies and portable toilet facilities not equipped with running water must always have at least a waterless alcohol-based hand sanitizer available for use adjacent to toilet facilities. You must follow label directions when using alcohol-based hand sanitizers.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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CHAPTER 749. CHILD PLACING AGENCIES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new Chapter 749, Child-Placing Agencies. New §§749.43, 749.61, 749.65, 749.67, 749.71, 749.101, 749.103, 749.105, 749.107, 749.131, 749.133, 749.163, 749.195, 749.231, 749.237, 749.239, 749.241, 749.245, 749.303, 749.331, 749.337, 749.339, 749.341, 749.343, 749.347, 749.349, 749.353, 749.359, 749.503, 749.507, 749.509, 749.513, 749.515, 749.535, 749.537, 749.553, 749.575, 749.577, 749.583, 749.601, 749.605, 749.609, 749.633, 749.669, 749.673, 749.741, 749.743, 749.761, 749.763, 749.769, 749.863, 749.867, 749.869, 749.881, 749.903, 749.931, 749.933, 749.935, 749.981, 749.989, 749.1003, 749.1005, 749.1007, 749.1009, 749.1011, 749.1013, 749.1015, 749.1019, 749.1101, 749.1103, 749.1105, 749.1107, 749.1111, 749.1113, 749.1115, 749.1131, 749.1133, 749.1135, 749.1137, 749.1183, 749.1189, 749.1281, 749.1301, 749.1309, 749.1311, 749.1313, 749.1319, 749.1321, 749.1331, 749.1333, 749.1335, 749.1337, 749.1339, 749.1361, 749.1363, 749.1367, 749.1371, 749.1373, 749.1377, 749.1379, 749.1405, 749.1409, 749.1413, 749.1415, 749.1417, 749.1421, 749.1425, 749.1433, 749.1435, 749.1461, 749.1463, 749.1469, 749.1521, 749.1523, 749.1541, 749.1543, 749.1561, 748.1563, 749.1565, 749.1609, 749.1611, 749.1641, 749.1645, 749.1671, 749.1673, 749.1803, 749.1807, 749.1809, 749.1813, 749.1815, 749.1819, 749.1841, 749.1861, 749.1891, 749.1921, 749.1923, 749.1925, 749.1927, 749.1951, 749.1957, 749.1959, 749.1961, 749.2001, 749.2051, 749.2053, 749.2055, 749.2059, 749.2061, 749.2101, 749.2105, 749.2107, 749.2205, 749.2301, 749.2303, 749.2305, 749.2337, 749.2383, 749.2441, 749.2447, 749.2471, 749.2473, 749.2475, 749.2487, 749.2551, 749.2553, 749.2555, 749.2557, 749.2561, 749.2593, 749.2595, 749.2621, 749.2623, 749.2625, 749.2627, 749.2629, 749.2631, 749.2633, 749.2635, 749.2651, 749.2653, 749.2803, 749.2815, 749.2817, 749.2823, 749.2903, 749.2905, 749.2911, 749.2915, 749.2917, 749.2931, 749.2961, 749.2967, 749.3021, 749.3035, 749.3039, 749.3061, 749.3063, 749.3069, 749.3073, 749.3075, 749.3077, 749.3133, 749.3137, 749.3145, 749.3323, 749.3343, 749.3371, 749.3391, 749.3395, 749.3425, 749.3461, 749.3463, 749.3465, 749.3501, 749.3503, 749.3523, 749.3573, 749.3621, 749.3623, 749.3629, 749.3801, 749.3831, 749.3861, 749.3865, 749.3869, 749.3871, and 749.3897 are adopted with changes to the proposed text published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2018). New §§749.1, 749.3, 749.41, 749.63, 749.69, 749.161, 749.165, 749.191, 749.193, 749.197, 749.199, 749.233, 749.235, 749.243, 749.271, 749.273, 749.301, 749.333, 749.335, 749.345, 749.351, 749.355, 749.357, 749.421, 749.423, 749.425, 749.501, 749.505, 749.511, 749.531, 749.533, 749.551, 749.555, 749.571, 749.573, 749.579, 749.581, 749.585, 749.587, 749.603, 749.607, 749.631, 749.635, 749.637, 749.661, 749.663, 749.665, 749.667, 749.671, 749.675, 749.677, 749.679, 749.721, 749.723, 749.725, 749.727, 749.767, 749.769, 749.771, 749.801, 749.831, 749.833, 749.861, 749.865, 749.883, 749.885, 749.901, 749.937, 749.939,

749.941, 749.945, 749.947, 749.949, 749.983, 749.985, 749.987, 749.1001, 749.1017, 749.1021, 749.1109, 749.1151, 749.1153, 749.1155, 749.1181, 749.1185, 749.1187, 749.1251, 749.1253, 749.1255, 749.1305, 749.1307, 749.1315, 749.1317, 749.1323, 749.1365, 749.1369, 749.1375, 749.1401, 749.1403, 749.1411, 749.1423, 749.1427, 749.1429, 749.1431, 749.1501, 749.1503, 749.1545, 749.1581, 749.1583, 749.1603, 749.1605, 749.1607, 749.1643, 749.1647, 749.1675, 749.1801, 749.1805, 749.1811, 749.1817, 749.1863, 749.1865, 749.1893, 749.1895, 749.1953, 749.1955, 749.2063, 749.2103, 749.2151, 749.2153, 749.2201, 749.2203, 749.2231, 749.2233, 749.2281, 749.2283, 749.2331, 749.2333, 749.2335, 749.2339, 749.2381, 749.2401, 749.2403, 749.2405, 749.2443, 749.2445, 749.2449, 749.2451, 749.2477, 749.2479, 749.2481, 749.2483, 749.2485, 749.2489, 749.2491, 749.2493, 749.2521, 749.2523, 749.2525, 749.2559, 749.2563, 749.2565, 749.2567, 749.2591, 749.2597, 749.2599, 749.2655, 749.2801, 749.2805, 749.2807, 749.2809, 749.2811, 749.2813, 749.2819, 749.2821, 749.2825, 749.2901, 749.2907, 749.2909, 749.2913, 749.2963, 749.2965, 749.3023, 749.3025, 749.3027, 749.3029, 749.3031, 749.3033, 749.3037, 749.3041, 749.3065, 749.3067, 749.3071, 749.3079, 749.3081, 749.3101, 749.3103, 749.3105, 749.3107, 749.3109, 749.3111, 749.3131, 749.3135, 749.3139, 749.3141, 749.3143, 749.3147, 749.3149, 749.3201, 749.3203, 749.3221, 749.3301, 749.3321, 749.3325, 749.3327, 749.3341, 749.3345, 749.3347, 749.3349, 749.3351, 749.3353, 749.3373, 749.3393, 749.3421, 749.3423, 749.3427, 749.3429, 749.3431, 749.3521, 749.3571, 749.3601, 749.3625, 749.3627, 749.3631, 749.3633, 749.3661, 749.3663, 749.3691, 749.3693, 749.3721, 749.3725, 749.3727, 749.3729, 749.3741, 749.3761, 749.3863, 749.3891, 749.3893, and 749.3895 are adopted without changes to the proposed text and will not be republished. Also in this issue of the *Texas Register*, DFPS is withdrawing §§749.611, 749.765, 749.943, 749.1303, 749.1407, 749.1419, 749.1465, 749.1467, 749.1601, 749.2057, 749.3723, and 749.3867 because of public comment and for clarification.

DFPS is required by Chapter 42 of the Human Resources Code to periodically review all minimum standard rules. In addition, part of the Child Care Licensing Division's (Licensing) business plan is to review, analyze, and update Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. In this issue of the *Texas Register*, DFPS is repealing Chapter 720, 24-Hour Care Licensing, and replacing it with three new chapters, one of which is Chapter 749, Child-Placing Agencies.

The existing minimum standards for child-placing agencies in Chapter 720 are outdated. The standards have not been revised since 1985. The current standards are divided according to the type of home where care is provided, e.g. therapeutic foster home, habilitative foster home, etc. The rules will consolidate the minimum standards for all these homes into a cohesive set of rules that are designed to focus on the needs of the children in care. Many of the changes are due to this consolidation.

In order to update the minimum standards, information has been obtained from providers and provider associations, Child Protective Services, and Licensing staff. Updates have also been made based on the review of available research and literature relating to the child development field, best practices in child placement, and health and safety practices recommended by experts such as the Consumer Product Safety Commission, American Academy of Pediatrics, and the Texas Department of State Health Services.

The rules will also facilitate an understanding of the law and Licensing requirements and are written using "plain language" techniques with a question and answer format. Rules that are easy to read and understand will result in higher rates of compliance.

The new sections will function by reducing the risk of harm to children and improving the quality of care due to updating standards based on current knowledge and practices. In addition, the standards will be easier to understand, which should encourage voluntary compliance and reduce noncompliance caused by misinterpretation of the rules.

The DFPS Council considered public testimony concerning these rules at the meetings held January 6, 2006 and April 7, 2006. Public meetings were held September 22, 2005, October 24, 2005, and March 23, 2006, to receive comment.

During the public comment period, DFPS received comments from Advocacy, Inc., The Arrow Project, Austin Children's Shelter, Azleway Children's Services, Buckner Child & Family Services, Caring Family Network, Child Placement Center, Christian Homes of Abilene, Coalition for Nurses in Advanced Practice, Crisis Prevention Institute, Inc., Department of State Health Services; DePelchin Children's Center; Devereux; Gladney Center for Adoption; Handle with Care; High Plains Children's Home and Family Services; Homes4Good; Houston Achievement Place; Lighthouse Family Network; Lutheran Social Services of the South; Pathway Youth & Family Services; Presbyterian Children's Home; Roy Maas' Youth Alternatives; The Settlement Club Home; Texas Alliance of Child & Family Services; Texas Foster Family Association, and 13 individuals. A summary of the comments and responses follows:

General Comments:

General: Thirteen commenters expressed general concerns about the rules in this chapter, including the fiscal impact, prescriptiveness, increased documentation requirements, and adoption requirements.

Response: The standards being proposed for adoption have been carefully considered and debated through years of workgroups, public hearings, and this last round of public comment and responses. DFPS staff have made hundreds of changes to remove financial costs, unnecessary prescription and to provide appropriate flexibility. Furthermore, DFPS will be weighting the standards relative to risk and enforcing them accordingly. DFPS staff recommend adoption of the standards as changed, believing they represent the best compromise between necessary health and safety precautions for children and the fiscal realities of providing foster care and adoption services.

Comments concerning specific rules:

§749.43. What do certain words and terms mean in this chapter?

Comment: DFPS received seven comments. One commenter requested that all definitions be moved to this rule. Six commenters requested that certain definitions be added to this rule.

Response: A printed minimum standards publication will be prepared and will include a comprehensive glossary.

Comment: DFPS received three comments regarding paragraph (4), adoption record. The commenters expressed concern or requested clarification regarding the requirement that the adoption record include records for the child's last 12 months of foster care.

Response: DFPS is adopting this paragraph without change. Since agencies now have the option of archiving records electronically, the record requirements should have minimal, if any, fiscal impact. Also, the requirement for foster care records as part of the adoption record is only intended to relate to the records of the agency for any period of foster care not to exceed 12 months prior to the adoption. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

Comment: DFPS received two comments regarding paragraph (6), caregiver. The commenters requested that this definition exclude babysitters and respite care providers, so that these persons would not be subject to every rule in the Chapter that refers to "caregivers."

Response: DFPS is adopting this paragraph with a change based on the comments.

Comment: DFPS received two comments regarding paragraph (8), child in care. One commenter expressed concern about how this definition affects an agency's liability for children in care. One commenter suggested distinguishing private placements from CPS placements.

Response: DFPS is adopting this paragraph without change. This definition reflects Licensing's current and future expectation regarding an agency's responsibility for a child in care. Also, for the purposes of Licensing regulation, there is no difference in a child's care based on who placed the child or who has conservatorship of the child.

Comment: DFPS received one comment regarding paragraph (14), diligent effort. The commenter questioned the meaning of "qualified professional" in this definition and suggested deleting the phrase "and qualifications and skills of other parties involved" from the definition.

Response: DFPS is deleting this paragraph. When this phrase has been used, it is replaced with "reasonable efforts," which has a more common meaning.

Comment: DFPS received one comment regarding paragraph (16), emergency behavior intervention. The commenter suggested defining each type of emergency behavior intervention in this rule.

Response: DFPS is adopting this paragraph without change. These definitions are in §749.2001. Also, a printed minimum standards publication will be prepared and will include a comprehensive glossary.

Comment: DFPS received one comment regarding paragraph (20), foster family home, and paragraph (21) foster group home. The commenter requested that the requirement for the foster home to be the primary residence of the foster parent(s) be deleted.

Response: DFPS is not making changes because DFPS believes it is vital for a foster home to be the primary residence of the foster parents. DFPS is adopting the paragraphs with changes that delete the age limits from these definitions, changing "children up to the age of 18 years old" to "children or young adults."

Comment: DFPS received one comment regarding paragraph (28), human services field. The commenter expressed some confusion about the language in this definition.

Response: DFPS believes the language in this paragraph is clear and is adopting it without change. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

Comment: DFPS received one comment regarding paragraph (29), immediate danger. The commenter expressed concern about the example in this rule of a child under 10 years old running away, stating that children older than 10 years old who run away should also be considered as in "immediate danger."

Response: The definition indicates that immediate danger may include children under 10 years old running away. This would not prohibit an agency from assessing that a child older than 10 years old is in immediate danger if they run away. DFPS is adopting this paragraph without change.

Comment: DFPS received one comment regarding paragraph (35), non-ambulatory. The commenter requested an editorial change to this definition.

Response: DFPS is adopting this paragraph with a minor editorial change based on the comment.

Comment: DFPS received one comment regarding paragraph (50), short-term placement. The commenter pointed out that this term is not used in the chapter.

Response: DFPS agrees, and is deleting this definition.

Comment: DFPS received five comments regarding paragraph (54), treatment director. The comments stated it was cost prohibitive in some instances to have a treatment director with no other responsibilities, and the treatment director needed to have the ability to assign the responsibilities to others.

Response: This definition is adopted with an additional sentence that clarifies the flexibility that an agency has in assigning treatment director responsibilities.

In addition to changes resulting from comments, DFPS is adopting §748.43 with the following changes:

Paragraph (1), Accredited college or university, is adopted with changes to more accurately reflect the federally recognized accrediting bodies for the United States.

Paragraph (27), health-care professional, is adopted with changes to be more consistent with other state agency rules governing health-care professionals. The Board of Nurse Examiners recommended this change.

Paragraph (56), volunteer, is revised in response to several comments regarding other rules related to volunteers. The definition is now limited to those volunteers who provide care or have unsupervised access to children in care. There are many volunteers who do not have contact with children and/or only volunteer for a single event. The definition is changed so that the requirements and limitations related to volunteers contained in other rules will only apply to those volunteers who have contact with children, and therefore potentially impact the health and safety of children in care.

§749.61. What types of services does Licensing regulate?

Comment: DFPS received four comments. One commenter made a suggestion about adding "wrap around treatment services." One commenter expressed concern that the definitions of treatment services do not capture enough children and should be broader. One commenter pointed out that the rules are incon-

sistent regarding the minimum age for children in a transitional living program. One commenter made editorial suggestions.

Response: DFPS is adopting this section with changes to correct an inconsistency with another rule by changing the minimum age for transitional living services to "14 years old". Also, "assessment services" is changed to "assessment services program" to clearly distinguish this specific set of services from routine assessments. DFPS is not revising the rule as a result of the second or fourth comment. Wrap around treatment services can be provided within these rules. A different type of "wrap around services" is not required. The definition of treatment services has already been changed based on previous input.

§749.71. May I have an independent living program?

Comment: One commenter requested that independent living programs be allowed.

Response: No change is made based on the comment. Licensing does not have jurisdiction over living situations in which young adults live independently. DFPS is adopting the section with a minor editorial change to match Chapter 748.

§749.103. What are my operational responsibilities as the permit holder?

Comment: One commenter questioned the term "controlling person" used in the rule.

Response: DFPS is adopting this section with a change. DFPS is clarifying the paragraph that refers to controlling persons to be more consistent with language in Chapter 745, Licensing. The printed minimum standards will also contain a reference to further information in Chapter 745 regarding controlling persons. DFPS is also clarifying that an agency must not act as an agent for unlicensed agencies, institutions, or individuals, which is consistent with current minimum standards.

§749.107. What must my conflict of interest policies include?

Comment: DFPS received three comments. The commenters expressed concern about the portions of this rule prohibiting current foster or adoptive parents from serving on the governing body of the agency or being an employee/contractor and prohibiting a current foster or adoptive parent from having an independent financial relationship with a person at the agency.

Response: DFPS is adopting this section with changes. The change to paragraph (2) clarifies that only persons currently providing foster care or currently in the process of adopting a child from the agency are prohibited from serving on the governing body or being an employee/contractor. They may serve in one of these positions when no longer verified by the agency and/or after the adoption is consummated. The change to paragraph (3) deletes the prohibition against independent financial relationships and replaces it with a requirement for the agency to develop a code of conduct related to these types of independent financial relationships.

§749.131. What are the specific responsibilities of the governing body?

Comment: One commenter requested that "family member" be defined as it relates to this rule.

Response: DFPS is adopting this section with clarifications based on the comment, including a new definition for "family member" at §749.43(19).

§749.165. How often must I have a professional audit?

Comment: One commenter expressed concern that Licensing personnel do not have the expertise to review financial audits.

Response: DFPS is adopting this section without change. Licensing staff will enforce that audits are completed. If an audit appears to be of concern, Licensing staff will seek the consultation of an expert within DFPS for review of the audit content.

§749.191. What type of financial report must I submit to Licensing if I provide adoption services?

Comment: DFPS received three comments, all expressing concern that this rule duplicates §749.165, which requires an annual professional audit.

Response: DFPS is adopting this section without change. This financial report is a current requirement and focuses on very specific, adoption-related information. This required report is different from the information that would be found in a third-party audit, which is required for all child-placing agencies.

§749.195. What types of fees may I collect prior to the completion and approval of a home study?

Comment: Three commenters suggested that agencies should be able to charge fees for training conducted prior to the approval of a home study.

Response: DFPS agrees that this is reasonable, and is revising the rule accordingly.

§749.231. What financial assistance may I provide for a birth mother?

Comment: DFPS received four comments. The commenters suggested that agencies be allowed to provide financial assistance for the living expenses associated with a birth mother's minor children.

Response: DFPS agrees that this is reasonable, and is revising the rule accordingly.

§749.237. How do I document financial assistance that I provide for a birth mother?

Comment: DFPS received four comments. Three commenters suggested that receipts not be required as documentation of financial assistance and that documentation of financial assistance be kept only in the agency's accounting department rather than in each birth parent's record. One commenter requested that Licensing delete the prohibition against using cancelled checks as documentation.

Response: DFPS is adopting this section with a change to delete the prohibition against using cancelled checks as documentation. No changes are made based on other commenter concerns. Receipts are required in the current minimum standards and birth parent expenses are a significant area of regulation, so it is critical that they be located with other birth parent information to facilitate enforcement.

§749.239. May I provide cash payments to birth mothers?

Comment: Two commenters expressed concern about the practicality of requiring a receipt from a birth mother acknowledging receipt of payment and documenting that the funds were spent for the goods and/or services intended.

Response: DFPS is adopting this rule with changes based on the comments.

§749.241. If a birth mother decides not to relinquish a child for adoption, may I require her to repay my agency or the adoptive parent for expenses and services incurred?

Comment: Two commenters expressed concern about the potential cost associated with providing written policy in a language the birth parent can read.

Response: DFPS is adopting this section with a change. There is no benefit to sharing information unless the birth mothers can understand it. Agencies have the option of not serving birth mothers when they cannot communicate with them. However, DFPS is revising the written policy requirement to be applicable "upon" (instead of "prior to") establishing any formal relationship between the agency and the birth mother. This will make it easier to comply with the requirement.

§749.245. If a birth mother's needs are met through existing resources, can I disrupt that arrangement?

Comment: Two commenters expressed concern that requiring birth parents to be in "imminent danger" before disrupting current living arrangements or financial support is too restrictive and should be more flexible.

Response: DFPS is adopting with a change to allow agencies more flexibility in assessing birth mothers' living situations and providing assistance when needed based on health and safety.

§749.303. What must I do before opening a branch office?

Comment: One commenter expressed confusion about to which agencies this rule applies.

Response: DFPS is not revising this rule as a result of comment. This rule applies to all agencies. There may be some confusion with the new rule (§749.2441), which limits foster home verification to one DFPS region. However, DFPS is changing the word "application" to "request" for clarification.

§749.331. What are the general requirements for my agency's policies?

Comment: DFPS received two comments. One commenter had questions about the requirements of this rule. Another commenter stated that the agency should have the right to change policies throughout the year without having to notify Licensing of every change, and suggested that an annual policy update to Licensing would be sufficient.

Response: DFPS is clarifying that the requirements of the rule only apply to policies required by this chapter. However, Licensing must be aware of policy changes related to requirements of this chapter, in order to ensure that the policies meet minimum requirements. Also, the rule only requires that policy changes be submitted to Licensing before the changes are implemented, not that Licensing approve the changes before they are implemented. DFPS is also making a change to delete the subsection requiring the governing body to approve policies, as this is already required in a different rule.

§749.333. What are the requirements for my admission policies?

Comment: One commenter requested that the admission policy requirements be revised to include characteristics of children the agency "primarily" serves and the conditions under which the agency would serve children "with higher or lower levels of needs."

Response: Although these rules offer agencies the opportunity to provide a greater continuum of care, agencies must offer multiple services in a planned and organized fashion. An agency must have a suitable plan and program in place for providing a specific type of treatment or programmatic service, including admission policies, before admitting a child who requires that type of service or program. DFPS is adopting this section without change.

§749.335. What information must my placement policy contain?

Comment: One commenter expressed concern that the rule was too prescriptive regarding the placement of siblings together.

Response: DFPS is adopting this section without change. The language in the rule leaves sufficient flexibility for agencies to make individualized decisions and document the reason(s) when siblings are separated.

§749.337. What policies must I provide to the person placing the child?

Comment: One commenter requested a minor clarification in the rule regarding providing adoption policies "if applicable."

Response: DFPS is adopting this section with the change based on the comment.

§749.339. What child-care policies must I develop?

Comment: One commenter expressed concern that this rule prohibited discipline of toddlers, stating that discipline as defined in this chapter is appropriate for toddlers.

Response: DFPS is adopting this rule with a change to delete the reference to toddlers, so that only discipline of infants is prohibited.

§749.341. What emergency behavior intervention policies must I develop if the use of emergency behavior intervention is permitted in my foster homes?

Comment: One commenter supported the rule and suggested broadening the scope of evaluations of caregivers qualified in behavior intervention to include an evaluation of their understanding of all risks involved in emergency behavior interventions, not just risks associated with prone restraints.

Response: DFPS is adopting this section with changes based on this comment and comments from Chapter 748. The phrase "if the use of emergency behavior intervention is permitted in my foster homes" is added so that it does not apply to those agencies that do not allow emergency behavior interventions. In order to clarify training and caregiver qualification requirements, DFPS is deleting the reference to evaluations of risks associated with prone and supine restraints in paragraph (3). These training requirements are specifically addressed in §749.901, along with other required emergency behavior intervention training content.

§749.343. What policies must I develop on the discipline of children in foster care and pre-adoptive care?

Comment: One commenter expressed concern that this rule prohibited discipline of toddlers, stating that discipline as defined in this chapter is appropriate for toddlers.

Response: DFPS is deleting the reference to toddlers, so that only discipline of infants is prohibited.

§749.347. What policies must I develop on the rights and responsibilities of the agency, foster parents, and caregivers?

Comment: DFPS received two comments. The commenters suggested that the rights and responsibilities should address fos-

ter parents' role in services to all children, not just children receiving treatment services.

Response: DFPS agrees, and is revising paragraph (10) based on the commenters' suggestion. This results in this requirement being more consistent with current minimum standards.

§749.349. What additional policies must I develop for foster parents that provide treatment services?

Comment: Two commenters expressed concern about the requirement that child placement management staff approve the policies required by this rule.

Response: DFPS agrees with the comment and is revising the rule.

§749.353. What policies must I develop for babysitters and respite child-care providers in foster homes?

Comment: One commenter expressed concern about the differences between Licensing respite care requirements and CPS contract requirements.

Response: Not all children in regulated care are placed by CPS. Therefore, Licensing requirements and CPS requirements are necessarily and appropriately different in some areas. DFPS is adopting this rule with minor editorial changes.

§749.421. Who are my clients?

Comment: One commenter stated that foster parents should not be considered clients once their home is verified by the agency.

Response: Foster parents are agency clients in that they receive certain services from the agency and are subject to agency decisions and policy changes. DFPS is adopting this section without change.

§749.507. When must I report other occurrences?

Comment: DFPS received five comments. Two commenters expressed concern that some elements of this rule were not "serious incidents." One commenter expressed concern about an inconsistency in one part of this rule with another rule. One commenter suggested that foster parents be added to the list of persons for which an arrest or criminal indictment must be reported to Licensing by the agency. One commenter expressed concern about the requirement to report suspected drug use of a person who cares for or has access to children in care.

Response: DFPS is adopting this section with a change, by moving several requirements of this rule to §749.503, so that all serious incident reporting requirements will be in the same rule, deleting two requirements, as they are already addressed in other rules in this chapter. DFPS is adding the requirement to report to parents any medically pertinent incidents and the requirement to report to Licensing the addition of a swimming pool at any foster home be added to the rule. DFPS is not making a change regarding the requirement to report suspected drug use of a person who cares for or has access to children in care, as this requirement is legislatively mandated. Other editorial changes are also made.

§749.509. How do I make a report of a serious incident or occurrence to Licensing?

Comment: One commenter requested clarification regarding which required notifications are actually "serious incidents."

Response: Based on the comment DFPS is adopting changes, which are also consistent with the changes to §749.503 and §749.507.

§749.515. Where must I keep incident reports?

Comment: DFPS received six comments. The commenters expressed concern about the requirement to keep serious incident reports on file at the foster home.

Response: DFPS is adopting this rule with changes to delete the requirement to keep serious incidents on file at the foster home and changing the requirement to keep the incident report "in the child's record" to "on file for two years." This prevents foster homes from having to maintain this paperwork and ensures that all serious incidents will be on file at the agency. The change gives agencies the option of having serious incident reports in a central file rather than in each child's individual record.

§749.535. How current must a record be?

Comment: DFPS received three comments. One commenter complimented this rule and two expressed concern about the 30-day requirement for filing documentation in the child's record.

Response: DFPS is revising the rule based on the comment. It now states that documentation must be in the record "within 15 days from the end of the month for monthly summaries."

§749.537. Must I make records available for Licensing to review?

Comment: DFPS received four comments. One commenter expressed concern about Licensing having unlimited access to records or taking copies of records without signing them out. Three commenters requested more time to retrieve archived records. One commenter requested an editorial change.

Response: DFPS is changing the time frame for retrieving archived records to 48 hours. The revised time frame should be sufficient time to retrieve archived records without unduly delaying Licensing inspections or investigations. Licensing has the duty and authority to regulate agencies, including review of agency records. Licensing may also copy records as part of its regulatory authority, and is not required by law to document for the agency what records were copied or for what purpose. Regarding the requested editorial change, Licensing believes that the rule is sufficiently clear as written.

§749.551. Where must I maintain personnel records?

Comment: One commenter questioned the need for a master list of records.

Response: DFPS is adopting this section without change. An agency may have records at several different locations, including branch offices and off-site storage of archived records. Agency staff need to know where each active and archived record is located.

§749.553. What information must the personnel record of an employee include?

Comment: DFPS received four comments. Three commenters suggested deleting "caregiver" from this rule so that it does not apply to foster parents. Comments were also received from the Department of State Health Services (DSHS) regarding tuberculosis screening requirements.

Response: This section is adopted with changes to delete the reference to caregivers from the rule and adding a specific exemption for foster parents (this is not an exemption from the tu-

berculosis screening requirements, which is required in another rule). DFPS is also revising this rule to reference §749.1417 regarding tuberculosis screening requirements.

§749.577. What information must an active child record include?

Comment: DFPS received two comments. One commenter asked a question about the required client identifier other than the child's name. Another commenter asked about the requirement for a "signature" on entries into the child record, as this would seem to negate use of electronic records.

Response: DFPS is adopting this section with changes to add "chronic health conditions" as information required to be clearly visible on and/or in the child's record, per current minimum standards, and changing the "signature" of employees making entries into the record to "name" in order to accommodate electronic record keeping. DFPS is not making changes related to the comment about client identifiers. A second client identifier is required so that children with the same or similar names can be clearly distinguished.

§749.581. Where must I maintain archived client records?

Comment: One commenter expressed concern about the requirement for an uniform record keeping system throughout the agency.

Response: DFPS is adopting this section without change. The record keeping system must be uniform, so that all offices are archiving records on the same schedule and in the same general manner. DFPS believes that this expectation is reasonable. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.583. Who must consent to the release of a child's record?

Comment: DFPS received two comments, both asking about releasing records as required by law, such as in response to court subpoenas or to Advocacy, Inc.

Response: DFPS is adopting this rule with change based on the comment.

§749.585. How long must I maintain client records?

Comment: DFPS received four comments. One expressed concern about having to maintain adoption records permanently, but suggested increasing the required time frame for maintaining foster home and foster applicant records. Three suggested increasing the required time frame for maintaining foster child records.

Response: DFPS is adopting this section without change. The requirement to maintain adoption records permanently is current rule. Time frames for maintaining other records cannot be increased at this time, as the potential fiscal impact of such changes has not been established.

§749.601. What must my written professional staffing plan include?

Comment: One commenter felt that the requirement for a professional staffing plan was redundant with the responsibilities outlined in job descriptions used in hiring.

Response: The professional staffing plan provides an overall picture of how tasks are divided between the professional staff. This is qualitatively different from information in various job descriptions. However, DFPS is deleting paragraph (3) because it is adequately addressed elsewhere, and clarifies that the staffing plan must be implemented.

§749.605. What minimum qualifications must all employees meet?

Comment: DFPS received three comments. One commenter felt that requiring TB testing for office personnel was not needed for CPA's since they may not have contact with children. One commenter felt that there should be a method to assure there is no danger present to children in requiring TB testing. Comments were also received from the Department of State Health Services regarding tuberculosis screening requirements.

Response: DFPS is adopting this section with a change that refers the reader to §749.1417, which revises the TB screening requirements according to DSHS recommendations.

§749.607. What general responsibilities do all employees and caregivers have?

Comment: DFPS received two comments. The commenters felt the expectation in paragraph (3) was not reasonable for all to know and comply with applicable rules of this chapter, Chapter 42 of the Human Resources Code, Chapter 745 of this title (relating to Licensing), and any other applicable laws.

Response: DFPS is adopting this section without change. The word "applicable" is used in this paragraph to indicate that staff only need training on those rules and portions of the law that are pertinent to their job. DFPS believes that this training expectation is reasonable.

§749.609. What are the requirements for tuberculosis screening?

Comment: DFPS received two comments. One commenter recommended more research and uniformity across the state in requirements for TB testing. Comments were also received from the Department of State Health Services (DSHS) regarding tuberculosis screening requirements.

Response: DFPS is adopting this rule with minor editorial changes and a change to refer the reader to §749.1417, which revises the TB screening requirements according to DSHS recommendations.

§749.631. What qualifications must a child-placing agency administrator meet?

Comment: One commenter suggested requiring a full-time administrator for every "x" number of families.

Response: DFPS is adopting this rule without change. Section 749.633 gives agencies some flexibility in meeting the requirement for a Licensed Administrator. Also, the Licensed Administrator is not prohibited from performing other duties at an agency, if needed, due to the agency's size.

§749.633. Can a child-placing agency administrator be an administrator for two residential child-care operations?

Comment: DFPS received two comments. One commenter expressed concern that this rule is too prescriptive, and one commenter submitted a comment that indicated confusion about the requirements for an administrator overseeing an assessment services program.

Response: DFPS is adopting this rule with changes, including changing the limit for at least one child-placing agency managed by a Licensed Administrator for a facility from 20 foster homes to 25 foster homes, adding that the person must be a Licensed Child-Care Administrator if also managing a general residential operation or a residential treatment center, and making several

editorial changes. The change from 20 to 25 foster homes, as the limit for a child-placing agency, is designed to offer agencies more opportunity to use this option without compromising the intent to ensure that the management of two operations remains a reasonable workload for the Licensed Administrator. DFPS is making no changes related to an assessment services program, other than a minor editorial change. The assessment services portion of the rule clarifies that other employees besides the Licensed Child-Placing Agency Administrator may be designated as the person responsible for administering the assessment services program.

§749.637. Who must have overall administrative responsibility when the child-placing agency administrator is absent on a frequent and/or extended basis?

Comment: One commenter expressed confusion about the requirements of this rule.

Response: DFPS is adopting this section without change. This rule is sufficiently clear as written. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.663. What are the responsibilities of child placement staff?

Comment: DFPS received two comments. The commenters felt that allowing child placement staff to have monthly face-to-face visits with the ability to miss two per year was adequate for children in basic care, but not for children receiving treatment services. One commenter also felt the contacts should be meaningful.

Response: DFPS is adopting this section without change. Agencies may always exceed this minimum requirement using their own rules and policies. However, to increase the requirements of this rule would cause an additional fiscal impact on some agencies, so the commenter's suggestions cannot be implemented at this time.

§749.669. How do child placement management staff document approval?

Comment: One commenter recommended an editorial change.

Response: DFPS is adopting the rule with the editorial change.

§749.673. What are the qualifications that an employee must have to perform child placement activities?

Comment: One commenter questioned whether Option (4)(B) was 10 monthly conferences annually or over the course of the number of years it takes to obtain the 3 years experience.

Response: DFPS is adopting this section with a change to add "annually" to option (4)(B) based on the commenter's question.

§749.677. What are the requirements for child placement management staff at a branch office?

Comment: One commenter questioned whether group supervision is acceptable.

Response: Group supervision is acceptable. DFPS is adopting this section without change.

§749.679. What are the requirements for the caseloads of my child placement staff?

Comment: One commenter questioned how to determine what "manageable" means in terms of caseloads.

Response: DFPS is adopting this section without change. The term "manageable" allows for flexibility given all the parameters that can affect a caseload.

§749.721. Must I have a treatment director?

Comment: One commenter assumed the number of children receiving treatment services is cumulative and not counted as children by specialized type of treatment service.

Response: That assumption is correct. All children receiving treatment services for emotional disorders, mental retardation, pervasive developmental disorders, and primary medical needs are counted for this determination. DFPS is adopting this section without change.

§749.725. What qualifications must a treatment director have?

Comment: DFPS received two comments. One commenter believed the subsection that requires a treatment director for children with primary medical needs to be a physician or licensed registered nurse was too expensive and impractical. One commenter recommended that the subsection that requires a treatment director for emotional disorders should only require a master's degree and not three years of experience working with children with emotional disorders.

Response: Licensing believes it is important for treatment directors to reflect the population of the children served in order for the needs of the children to be met adequately. DFPS is adopting this section without change.

§749.727. If I provide more than one type of treatment service, can I have one treatment director?

Comment: One commenter supported the rule.

Response: DFPS is adopting this section without change.

§749.741. What treatment services must a registered nurse provide if I support a child with primary medical needs?

Comment: DFPS received five comments. One commenter recommended deleting subsection (b)(3) which requires a registered nurse to direct the medical training of caregivers since this may be done by a physician and the shortage of nurses makes this cost prohibitive and impacts the agency's ability to obtain liability insurance. Three commenters felt that the rule should allow for the nurse to contract through another agency, since that may be more cost effective. The Board of Nurse Examiners recommended changing the rule to incorporate legal language about what tasks a nurse can delegate.

Response: DFPS is adopting this section with changes based on comments. Both of the suggestions to keep down costs have been incorporated: the requirement for nurses to direct the medical training of caregivers has been deleted, and contracts with nurses can be "individually or through an agency." Revisions to paragraph (b)(2) were made based on the Board of Nurse Examiners' recommendations.

§749.743. In what circumstances may a physician or registered nurse (including an advanced practice registered nurse) delegate nursing tasks to unlicensed caregivers?

Comment: DFPS received four comments. One commenter recommended that the rule allow for contract nurses. One commenter recommended using the term "care tasks" instead of "nursing tasks" and the term "caregiver" instead of "unlicensed person" in order to not be in conflict with some RN rules. One commenter was concerned that the wording of "unlicensed nurs-

ing personnel" may create a liability for the medical professional and caregiver. The Board of Nurse Examiners recommended changes to the rule.

Response: Section 749.741 has been revised to specifically allow for contracting with nurses, individually or through an agency. The rule is also revised to refer to "unlicensed caregivers" throughout the rule and with changes based on the recommendations of the Board of Nurse Examiners.

§749.761. What are the requirements for a volunteer?

Comment: DFPS received two comments. One commenter suggested that further clarification is needed about who is defined as a volunteer, especially given the number of short-term groups, such as church groups, that provide some services. One commenter suggested including any training requirements that might be pertinent in regard to the use of emergency behavior intervention by volunteers.

Response: DFPS is not making changes as a result of the comments. The definition of a volunteer is changed to apply only to those who provide care for children or who have unsupervised access to children. The training requirements are already included in §749.763. Volunteers who act as staff must meet the same requirements as staff. DFPS is making minor editorial changes.

§749.763. Are there additional requirements for a volunteer or contractor that performs employee or caregiver functions?

Comment: One commenter believed that this rule was not in harmony with Chapter 748 and that it should be clear that visitors who come and go should not have to meet the same requirements as staff.

Response: The definition of a volunteer has been changed to only those who provide care for children or who have unsupervised access to children. Also, only volunteers who act as staff are required to meet the same requirements as staff. DFPS is clarifying that this rule also applies to contract service providers and this rule and §748.723 have been made consistent.

§749.863. What are the pre-service hourly training requirements for caregivers and employees?

Comment: DFPS received six comments. Two commenters believed that the term "group of children" should be defined and there should be consideration for a single child in care. Three commenters felt that the proposed rule requiring 16 hours of training for foster parents was too much too early and it should be reduced to 8 or 12 hours of pre-service and then 12 or 16 hours of annual training. One commenter felt the requirement for 8 hours of pre-service training for administrators was excessive, especially if they had no contact with children. Two commenters felt that the regulation would hinder the availability of foster homes and be cost prohibitive. One of the commenters felt the requirement should be 4 hours for basic care and 8 hours for treatment care. One commenter believed that the requirement for 16 hours of pre-service training on emergency behavior intervention should apply to all caregivers. Six commenters said there is a significant difference between requirements for facilities and child placing agencies (CPA's). One commenter felt the required 16 hours of pre-service training would be very costly, unrealistic, and unnecessary. One commenter felt the number of hours required for pre-service training were not adequate. One commenter believed that the requirement should mirror the requirements in most emergency behavior intervention courses. One commenter felt the pre-service training requirements exceeded COA standards and should be reduced. Five commenters recommended replacing the 16 hours of emergency behavior intervention training with 12 hours.

Response: While there were some competing comments regarding whether the proposed training hours were excessive or deficient, DFPS is changing the rule to reduce the hours of pre-service training regarding emergency behavior intervention from 16 to 8 for caregivers caring only for children receiving treatment services for primary medical needs, and caregivers for children receiving other treatment services if the caregiver's agency prohibits the use of emergency behavior intervention. Considering these caregivers will be responsible for children 24 hours a day, seven days a week, DFPS believes the benefit from these limited number of pre-service training hours, before a caregiver can be responsible for a child, far outweighs the remaining fiscal impact. Some additional editorial changes are made, including a clarification that the responsibility requirement applies to any child in care.

§749.869. What are the instructor requirements for providing pre-service training?

Comment: DFPS received four comments. Two commenters asked that the term "qualified instructor" be defined. One commenter asked what was meant by the term "recognized". One commenter commended DFPS for including the requirement that pre-service training on emergency behavior intervention must be competency based. This commenter also suggested changing the requirement to require a certified instructor. One commenter believed the subsection (d)(1) carries a fiscal impact and recommended that for agencies whose policies prohibit emergency behavior intervention, there be an exception for this training requirement.

Response: DFPS is adopting the section with minor editorial changes only. "Qualified instructor" is not delineated further because the qualifications will depend on the training topic, the characteristics of the children served, etc. The emergency behavior intervention instructor qualifications in subsection (d)(1) are essentially the same as current minimum standards. Since all agencies do not use nationally recognized methods of emergency behavior intervention, a mandate for a certified instructor in one of those methods would have a fiscal impact. Guidance about "recognized method of emergency behavior intervention" will be added to the minimum standards publication.

§749.881. What curriculum components must be included in the general pre-service training?

Comment: One commenter believed paragraphs (5) and (7) should not be requirements for training.

Response: Based on the comment, DFPS is deleting paragraph (7) regarding training on the location and use of fire extinguishers and first-aid equipment. Paragraph (5) requires training on procedures to follow in emergencies such as weather-related emergencies or the severe injury of a child. It is important that persons learn general information about how to respond to these emergencies (such as the safest place to go during a tornado) as well as learn the agency's expectations related to such emergencies (such as reporting to the agency after a foster home is damaged by a tornado). DFPS is also making editorial changes.

§749.883. Are there additional general pre-service training requirements for a caregiver who will care for children younger than two years old?

Comment: One commenter suggested moving the requirement for understanding early childhood brain development to annual training.

Response: DFPS is adopting this section without change. This is only a pre-service training requirement and is reasonable to expect for those who care for very young children. (The specific annual training requirements for caregivers of younger children, rule §749.943, are recommended for deletion.)

§749.901. If I do not allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

Comment: DFPS received two comments. One commenter suggested including the risks of all restraints in the training and adding education on all risks of restraints. One commenter suggested that the topics are related to child safety but are too prescriptive and this would hinder a trainer.

Response: Adding to the rule would be a fiscal impact for many agencies, and current training requirements capture the information sufficiently. The list of required training topics is taken from current minimum standards. DFPS is adopting this section without change.

§749.903. If I do not allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

Comment: One commenter felt the list of components was too prescriptive and would hinder a trainer.

Response: DFPS is not revising the rule as a result of comment. DFPS believes the curriculum components are necessary to ensure the health and safety of children, particularly since some children in Texas have either died or been seriously injured as a result of personal restraints. This section is adopted with minor editorial changes only.

§749.931. What are the annual training requirements for caregivers and employees?

Comment: DFPS received nine comments. Two commenters asked for clarification in (1) on whether it meant 20 hours per couple. One commenter felt that 20 hours per foster parent would mean an increase in training costs and a increase in staff time for these tasks. One commenter felt the term "distributed appropriately" in paragraph (2) should be better defined and suggested that there be a requirement that each parent must have some training. One commenter felt that there should be a separate requirement for children with primary medical needs. One commenter recommended changing the required hours from 50 to 30 for homes caring for children with primary medical needs. One commenter felt that the required 30 hours in paragraph (7) was excessive. One commenter felt the requirements would add too much additional cost to providers. Four commenters felt the proposed change would significantly increase the cost of care. Two of those recommended keeping current training requirements. One commenter felt the increase of required training hours would be significant but not adequate, and recommended that DFPS adopt a uniform training curriculum that will professionalize direct care services.

Response: DFPS is adopting this section with changes based on the comments. DFPS is (1) clarifying that the 20 hours of training for foster parents is "per couple", however, each must have the four hours of emergency behavior intervention training, and each foster parent must receive some amount of training that is distributed appropriately; (2) further defining "distributed appropriately" to mean "based on the distribution of caregiver responsibility"; (3) reducing the requirement for training for caregivers for children receiving treatment services for primary medical needs from 50 hours to 20 hours, which is the current minimum standard; and (4) reducing the number of training hours for administrators, executive directors, treatment directors, and professional service providers that do not have a relevant license from 30 hours to 20 hours. These changes should eliminate any fiscal impact, because the rules will now either be consistent with current standards, or for those that require additional hours of training, they are consistent with the contract requirements of Child Protective Services.

§749.933. When must an employee or caregiver complete the annual training?

Comment: One commenter felt that the agency should be given the option of using a date other than January 1st if that is not the beginning of its fiscal year.

Response: DFPS is adopting the rule with changes in response to the comment.

§749.935. What types of hours or instruction can be used to complete the annual training requirements?

Comment: DFPS received four comments. One commenter felt that in order to do the required training, child care would be a problem for foster families and this is not reflected in the fiscal impact statement. The commenter recommends using web-based training as a viable source for training foster parents. One commenter requested that the example given in subsection (b)(6) be clarified, as not all caregivers are required to obtain the same amount of training. One commenter felt that coming back through pre-service training should be counted toward annual training for foster parents. One commenter recommended subsection (d) be changed to one-fourth instead of one-third.

Response: DFPS is clarifying subsection (b)(6) as a result of the comment. Also, new subsection (e) is added. In response to the first commenter, annual training requirements in §749.931 have been reduced to more closely mirror current minimum standard requirements. Web-based training is not prohibited. Foster parents can obtain one-third of the required training via self-instructional training, which certainly may be web-based. While DFPS believes foster parents do need training that is presented face-to-face with an instructor, where questions and issues can be discussed and resolved, this rule does not preclude web-based training that is instructor led. In response to the last commenter, the one-third in subsection (d) cannot be changed to a lesser amount at this time, as this would affect the fiscal impact of the rule. Finally, Licensing will not count repeating the same pre-service curriculum toward annual training requirements. However, the agency can offer annual training on similar topics that is more advanced or offers new information.

§749.937. Does Licensing approve training resources or trainers for annual training hours?

Comment: One commenter felt that there was support in adult learning for the use of e-learning techniques and that these be allowed in a specified percentage of the time even for emergency behavior intervention, first aid, and CPR.

Response: DFPS believes it is important to learning, particularly in skill-based trainings like first aid or CPR, that a qualified instructor be available to answer questions and to observe tech-

niques applied and give correction as needed. DFPS is adopting this rule without change.

§749.941. What areas or topics are appropriate for annual training?

Comment: DFPS received four comments. One commenter felt the rule was too prescriptive. One commenter felt other topics might include therapeutic intervention techniques for children with medical and/or psychological issues, effective parenting techniques, sexual abuse training and attachment disorders. One commenter asked for clarification that there are other topics not listed that are also appropriate.

Response: DFPS is adopting this rule without change. This list has already been revised significantly and broadened based on previous provider input. The rule does not preclude annual training on topics other than those listed in the rule.

§749.949. What documentation must I maintain for annual training?

Comment: One commenter felt that this rule disallowed the use of computerized record keeping for training.

Response: DFPS is adopting this section without change. The agency can scan an appropriate document if electronic record keeping is preferred.

§749.981. What first-aid and cardiopulmonary resuscitation (CPR) certification must caregivers have?

Comment: Two commenters felt the rule should clarify that it applied to one child as well as a group of children.

Response: DFPS is adopting this rule with a change to address the comment.

§749.985. Who can provide first-aid and CPR certification?

Comment: One commenter felt subsection (b) conflicts with §749.989(b)(4).

Response: DFPS is not revising this rule, but is clarifying §749.989(b)(4).

§749.987. What must first-aid and CPR training include?

Comment: One commenter recommended clarification that the re-certification of first aid and CPR may be done through watching a video tape.

Response: DFPS is adopting this rule without change. The use of a video tape is acceptable only if an appropriate instructor is present to answer questions and correct the practice techniques of learners as needed.

§749.989. What documentation must I maintain for first-aid and CPR certification?

Comment: DFPS received two comments. One commenter said that subsection (b)(4) conflicts with §749.985(b). One commenter felt that the requirements in this rule disallowed the use of computerized record keeping when centralized training is offered.

Response: DFPS is clarifying subsection (b)(4) based on the comment. In response to the second comment, the agency can scan an appropriate document if electronic record keeping is preferred.

§749.1003. What rights does a child in care have?

Comment: DFPS received 11 comments. One commenter stated that there are too many rights. Another commenter recommended that several sections of the rule be deleted, stating that the list of child rights is redundant, the list is not generic enough to cover all ages and types of care, and some of the wording presents problems for faith-based agencies. Four commenters suggested or requested language changes to certain sections of the rule for purposes of clarification. Four commenters stated that paragraph (20) will interfere with the placement of non-English speaking children. Requiring agencies to provide for an interpreter "at all times" is over-reaching. One commenter stated that the determination of "unnecessary or excessive" medication in subsection (b)(23) should be a decision made by a physician, not caseworkers or parents. One commenter suggested replacing subsection (b)(28) with: "Provide counseling and encouragement in personal decision making while informing the child of her right to be free from pressure to make a particular decision about her pregnancy."

Response: With the exception of the right to be able to communicate in a language that is understandable to the child, there is no fiscal impact to this requirement. Many of these rights are in current rule or were added to provide clarification. Staff believe all children in care deserve the rights enumerated in this rule and that acknowledging a child's rights does contribute to a child's overall well-being. Regarding the issue of being able to communicate, DFPS did a survey that indicated 65% of the agencies already comply with this rule. In addition, agencies have the choice of not accepting a child into care if they can't communicate with him. DFPS has added language to the rule that states, "You must make every effort to place a child with foster parent(s) who can communicate with the child." DFPS believes that the benefit of having children placed with caregivers that they can understand outweighs the fiscal impact. However DFPS did remove the language that requires someone to be in the home that can communicate with the child at all times. DFPS is also clarifying that not discriminating based on gender only applies to those agencies that accept both genders and adding a right not to be required to make public statements acknowledging his gratitude to the foster home or agency

§749.1005. How must I inform a child and the child's parents of their rights?

Comment: DFPS received two comments. One commenter stated that children may be accepted for admission some time before they are actually admitted. The commenter suggested changing "accepted" to "admitted." One commenter stated that the number of issues to be addressed and the technical terms used in subsections (a) and (b) make it impossible to explain the child's rights in "simple, non-technical terms".

Response: DFPS is adopting this section with a change to inform a child of his rights within seven days, rather than 24 hours, and is changing "accepted" to "admitted" as suggested by a commenter. DFPS can also provide agencies with technical assistance to provide client rights in simple, non-technical terms or refer them to agencies that may be of assistance.

§749.1007. What are a child's rights regarding education?

Comment: One commenter stated that this rule appears to eliminate the possibility of "home schooling" by foster parents. If foster parents home school their biological children, they must be allowed to home school a foster child.

Response: DFPS is adopting this rule with changes that allow for the possibility of home schooling. See §749.1891 for other revisions related to home schooling.

§749.1009. What right does a child have regarding contact with a parent?

Comment: DFPS received three comments. One commenter stated that requiring so many elements to be included in the service plans makes it unwieldy and less effective in direct care and services. The commenter suggested requiring that visit/contact planning be documented, but not in the child's service plan. Two commenters wanted subsection (d) deleted or revised to give an agency more latitude in making decisions to limit family contact when appropriate.

Response: DFPS is adopting this rule with changes to address the comments. Documentation of any plans for child/parent contact is required in the child's record rather than in the service plan. Subsection (d) is clarified so that it only applies to restrictions imposed by the agency.

§749.1013. What right to privacy does a child have with respect to his contact with others?

Comment: One commenter stated that the subsection regarding providers not being able to open or read the child's incoming or outgoing mail, including electronic mail is problematic, irresponsible, and a safety issue as they need to able to monitor emails and internet use to avoid any predator problems.

Response: DFPS is revising the rule as a result of comment. Subsections (a) and (b) are revised so that young children can have assistance with reading/writing mail or using the telephone. And monitoring calls has been clarified to mean listening to or screening calls.

§749.1015. Under what circumstances may I conduct a search for prohibited items or items that endanger a child's safety?

Comment: DFPS received three comments. One commenter stated that foster parents want to be able to check foster children like they do their biological and adopted children on an as needed basis. They feel not being allowed to treat all children with the same "smart" parenting style is unrealistic and dangerous to the foster family. One commenter recommended changing these requirements to apply only to children receiving treatment services because they are too specific and cumbersome for the young, basic care children. Another commenter thanked the department for including regulations regarding conducting searches.

Response: Based on the commenters' concerns, the rule is changed to clarify that reasonable searches are allowed "for prohibited items or items that endanger a child's safety."

§749.1017. May a caregiver conduct a body cavity search of a child in care?

Comment: DFPS received two comments. One commenter recommended changing these requirements to apply only to children receiving treatment services. The requirements are too specific and cumbersome for young, basic care children. Another commenter thanked DFPS for including regulations regarding conducting searches.

Response: DFPS is adopting this section without change. Body cavity searches on foster children could have negative physical and mental health consequences for the child.

§749.1019. What must a caregiver document regarding a search?

Comment: DFPS received four comments. One commenter recommended changing these requirements to apply only to children receiving treatment services. Another commenter thanked DFPS for including regulations regarding conducting searches. Another commenter stated that it is a HIPAA violation to mention other children's names in a client's clinical record. The commenter requested that Licensing clarify what is meant by "resolution of the issue." Another commenter recommended deleting this rule, as it shifts the responsibility from the child, who is required to follow certain rules as to clothing and possessions, to the caregiver who is responsible for enforcing the policies and procedures.

Response: Documentation is only required when a search results in the removal of personal items or clothing worn by the child. DFPS believes that documentation in these situations is reasonable and necessary. DFPS is adopting this rule with changes based on the remaining comments. The requirement to document names of other children involved in the search is deleted. "Resolution of the issue" is clarified by adding examples of "increased supervision, additional therapy, or disciplinary consequences."

§749.1021. What techniques am I prohibited from using on a child?

Comment: DFPS received seven comments. One commenter suggested deleting "hugs" from paragraph (5) of prohibited techniques. Six commenters wanted clarification to know if hug therapy should not be done even if recommended by the treating counselor.

Response: Hug therapy, also known as holding therapy, is a specific type of therapy. This is not meant to refer to the social interaction of hugging. Hug therapy has resulted in child deaths and, therefore, is prohibited from use. DFPS is adopting this rule without change.

§749.1103. After a child in my care turns 18 years old, may the person remain in my care?

§749.1105. May I admit a young adult into care?

Comment: DFPS received two comments on each rule. One commenter stated that foster parents are really excited about this addition to the standards and heartily approve. Another commenter expressed appreciation for this clarification.

Response: DFPS is adopting these rules with further clarifications that are consistent with the positive comment. These rules are revised to comply with Senate Bill (S.B.) 6 to permit a young adult to remain in care up to the age of 22 years old in order to: transition to independence, including attending college or vocational or technical training; and attend high school, a program leading to a high school diploma, or GED classes.

§749.1111. What orientation must I provide a child?

Comment: DFPS received six comments. Five commenters wanted the timeframe for providing a child with orientation expanded to get all of orientation requirements explained and understood at a time when the child is less traumatized by the move. One commenter stated that documentation requirements in subsection (d) are time intensive and a lot of documentation for its value.

Response: DFPS is adopting this rule with changes, which will allow a more flexible timeframe of seven days from the date of the child's admission instead of at the time of admission. In response to the last comment, agencies can develop a form or checklist in order to document these requirements.

§749.1113. What information must I share with the parent at the time of placement?

Comment: One commenter stated that the information that must be shared with the child's parent is greatly expanded and is identical to requirements listed in Chapter 748. It was recommended that current requirements be utilized.

Response: DFPS believes the parents' right to information about placement and their child is the same for all residential child-care operations. The list noted in this rule is minimal, however, DFPS is clarifying which situations a parent may withdraw consent.

§749.1115. What information must I provide caregivers when I admit a child?

Comment: Six commenters stated that it may be helpful to add specifics or some examples of what is meant by "child's immediate needs."

Response: DFPS is adopting this rule with changes based on the comments. The following examples have been added: enrolling the child in school or obtaining needed medical care or clothing.

§749.1131. When must I complete the admission assessment?

Comment: The commenter stated that the requirements in this rule are greatly expanded and are identical to requirements listed in Chapter 748. It was recommended that current requirements be utilized.

Response: DFPS believes the requirements for a child's admission assessment are important in gathering information to work with the child and providing the services the child needs, and is adopting the rule with only one editorial change.

§749.1133. What information must an admission assessment include?

Comment: DFPS received four comments. One commenter suggested including known medical conditions that would be contraindications to the use of restraint in subsection (a)(8). One commenter stated that subsection (b) will be a great benefit to operations in providing continuity of care. However, a request for information from another provider without a signed authorization from the managing conservator could not be honored. One commenter stated that the information that the admission assessment is greatly expanded and is identical to requirements listed in Chapter 748. It was recommended that current requirements be utilized. Several commenters requested that information gathered as part of the admission assessment be limited and allow for the other required elements to be documented at a later time.

Response: DFPS is revising the rule to divide the admission assessment requirements into two new subsections, (b) for requirements to be completed prior to a child's non-emergency admission that address the child's immediate needs and current level of functioning, and (c) for information to be added to the child's admission assessment prior to completing the child's initial service plan that address the child's long-term needs and historical information. Also, the last subsection of the rule is revised based on the concern that the agency must obtain the managing conservator's authorization to request written information from other operations. "Known contraindications to the use of restraint" was not added to this rule, but it was added to §749.1107 and §749.1189 to be documented in the admission assessments.

§749.1135. What are the additional admission requirements when I admit a child for treatment services?

Comment: DFPS received three comments. One commenter requested clarification regarding paragraph (3) and asked if it is referring to a child with a dual diagnosis, primary medical need, or therapeutic need. One commenter stated that most physicians will not provide the statement that the child can be cared for appropriately by the agency as provided in paragraph (3)(A) due to liability issues. The physician will provide a statement that the foster parents have been trained to meet the needs of the child and demonstrated competency. One commenter stated that the requirements in this rule are greatly expanded and are identical to requirements listed in Chapter 748. It was recommended that current requirements be utilized.

Response: DFPS is adopting this rule with minor editorial changes only. Many of the requirements in this rule are taken from current minimum standards. DFPS believes that the rule is sufficiently clear, and the requirements of the rule are designed to ensure appropriate care and treatment for children.

§749.1151. What are the medical requirements when I admit a child into care?

Comment: One commenter stated that when a child is coming from a hospital, there will be no problem meeting the requirement that a child have a medical examination within seven days before or three days after admission. When the child is not, pediatricians rarely have a well-child appointment on three days notice.

Response: This rule is more flexible than the current minimum standards, which requires an exam within 72 hours prior to admission. Agencies should already be in compliance with this rule. DFPS is adopting this section without change.

§749.1153. What are the dental requirements when I admit a child into care?

Comment: One commenter likes the changes in this rule and feels it will be much easier to meet the dental requirements with these new requirements.

Response: DFPS is adopting this section without change.

§749.1183. What constitutes an emergency admission to my child-placing agency?

Comment: One commenter wanted clarification regarding whether this requirement includes lateral moves between homes in the same agency. If a child in a foster home has allegedly perpetrated a child within the same home, can you take the alleged perpetrator and admit them to another foster home within the same agency as a safety plan? Is this considered an emergency admit to a new home?

Response: A transfer of a child in care is not considered an admission. DFPS is adding another situation that constitutes an emergency admission: a child is without adult care.

§749.1187. For an emergency admission, when must I complete all of the requirements for an admission assessment?

Comment: DFPS received three comments. The commenters recommended that the 30-day time frame in subsection (b) be revised. Two of these commenters suggested that a child not

continue in care for more than "*40*" days after the date of admission unless the child has received the required professional evaluation, while the third other commenter suggested a "*90*" day timeframe. The commenter indicated that it is difficult to get all the assessments scheduled and completed in 30 days, especially in rural areas of the state.

Response: DFPS is adopting this rule without change. This requirement is based on current minimum standards. Children who have already been determined to need treatment services should have much of this information readily available.

§749.1251. What are the requirements for pre-placement visits for a child?

Comment: One commenter asked that instead of a pre-placement visit for infants, the foster parent(s) must meet the infant prior to placement. The commenter asked for clarification on the word "meaningful" in subsection (b).

Response: DFPS believes it is important for the child and foster family be together in the actual foster home setting prior to the placement to help ensure the adjustment of the child to the placement. It is sound placement practice to allow the foster parents and the child time between visits to consider if the placement is appropriate. This time is considered a "meaningful interval" based on the needs and characteristics of both the child and the family. DFPS is adopting this rule without change.

§749.1253. What must staff do to prepare a child for placement?

Comment: One commenter asked that the rule specify that this is the responsibility of the agency that has possession of the child.

Response: DFPS is adopting this section without change. Preparation of the child may be the responsibility of all parties involved in the placement as part of sound placement practice. DFPS is uncertain of what the commenter means by "possession of the child."

§749.1281. What are the requirements when I move a child from one foster home to another?

Comment: One commenter asked that subsection (b) be changed to require the child placement management staff to give the approval to move the child in an emergency, rather than child-placing staff.

Response: DFPS is revising the rule based on the comment.

§749.1301. What are the requirements for a preliminary service plan?

Comment: DFPS received five comments. Two commenters expressed concern with subsection (b)(6) regarding the location of a child's bedroom. One commenter suggested deleting the requirement for a preliminary service plan for children receiving "basic" foster care. One commenter stated that this is greatly expanded and recommended that current requirements be utilized. Another commenter stated that this rule poses an additional fiscal note, time, and paperwork.

Response: Based on the comment, DFPS is deleting the requirement regarding the location of the child's bedroom. However, DFPS is not deleting this section, because DFPS believes it is reasonable and important to require a preliminary service plan within 72 hours to provide guidance to caregivers in addressing the immediate needs of a child. Clarification language has been added to further describe the immediate needs of a child "such as enrolling a child in school or obtaining needed medical care or clothing." This is also important because the new Chapter 749 rules have extended the time frame for the completion of a child's initial service plan from 30 days to 40 days. DFPS believes the benefits outweigh the fiscal impact that was noted during publication.

§749.1309. What must a child's initial service plan include?

Comment: DFPS received four comments regarding §749.1309. One commenter stated that the service plan requirements for basic children is too treatment oriented. It was suggested that clause (1)(A)(vii) - (viii) and subparagraph (E) be moved to treatment services regarding dental needs, intellectual functioning, and a plan for education on interpersonal relationships. One commenter wanted clarification regarding subsection (b)(3)(D) that is the same for every service/treatment plan. The commenter wanted to know what is different about this requirement that prompts another section of the standard. Two commenters stated that the number of service items to be evaluated, planned, delegated and completed in this rule is overwhelming and recommended reducing and simplifying these requirements. One of the commenters also stated that it would result in a document so large, detailed, and complex that caregivers would find it difficult to read and carry out the service plan. The regulation suggests that the needs listed must have plans regardless of whether it is identified as a need for the specific client.

Response: DFPS is adopting this section with minimal changes based on comments and some editorial changes. DFPS believes these requirements are reasonable and necessary to address the needs of a child in the initial service plan. Subsections (b)(1)(A)(vii) and (b)(1)(E) are appropriate for all children. Subsection (b)(1)(A)(viii) will also apply to many children who do not meet the criteria for treatment services but have treatment needs. Subsection (b)(3)(D) regarding emotional, physical, and social needs requiring specific professional experience has been clarified and is now subsection (b)(2)(D). Subsection (a) states the service planning team may prioritize the child's service planning goals and objectives based on the child's admission assessment, but there must be a justification for the delay in addressing the needs.

§749.1311. Who must be involved in developing an initial service plan?

Comment: DFPS received two comments. One commenter stated that foster parents like the requirement as provided in subsection (a)(3) as long as the two professionals do not have to be present at the initial service plan meeting but can participate via teleconferences and written reports. Another commenter stated appreciation for providing these more flexible options for which professionals can serve on the service planning team.

Response: DFPS is adopting this rule without change. Being involved in developing an initial service plan does not require the professionals to be present at the meeting, although it is preferable for purposes of discussion.

§749.1313. When must I inform the child's parent(s) of an initial service plan meeting?

Comment: One commenter requested clarification of the word "summary" and suggested allowing for documentation of verbal notification of parent of an initial service plan meeting.

Response: DFPS is adopting this rule with a change to allow the verbal notification of a parent regarding an initial service plan meeting.

§749.1319. What must I document regarding a professional service provider's participation in the development of an initial service plan?

Comment: One commenter stated that subsection (b) is not needed since it provides for disagreement with any plan elements. If there is no disagreement, then the plan is good and the professional service providers' comments were incorporated into the service plan.

Response: DFPS is not modifying the rule based on the comment because a service plan could be developed and the professional service provider would not agree with all aspects of the plan. However, DFPS is deleting the requirement to document comments or input made by professional level service providers in the development of an initial service plan. Editorial changes are also made to this subsection as a result of the revision. The subsection regarding the effective date of the plan is deleted.

§749.1321. With whom do I share the initial service plan?

Comment: One commenter recommended that caregivers be given a copy of the initial service plan before anyone else receives it.

Response: DFPS is clarifying that caregivers must be given a copy or summary of an initial service plan, and you must document that it was given to the parents. However, DFPS disagrees that caregivers should be given a copy of the plan before anyone else. Since the child, parents, caregivers, agency staff, etc. should be involved in developing the plan, there is no reason for a caregiver to receive the written plan before others.

§749.1323. When must I implement a service plan?

Comment: One commenter requested clarification to know if the rule means that if it takes the full 40 days to get the service plan completed, the plan does not have to begin until the child is in care 50 days.

Response: The commenter is correct. DFPS is adopting this rule without change.

§749.1331. How often must I review and update a service plan?

Comment: DFPS received three comments. One commenter stated that for children of Moderate levels of care, Youth for Tomorrow (YFT) requires treatment plans every 180 days. The commenter thinks that every 90 days is a better practice, but this will create disagreement between YFT rules and standards. One commenter stated that when children are stable and in placement long term, frequent reviews become irrelevant. It was recommended that the frequency of reviews be reduced by 50% after a child has been stable in care for two years. Updates or reviews should be done when the child's needs dictate. Another commenter stated that foster parents experienced in working with children with mental retardation believe that treatment plans reviewed every 180 days during the first year and annually thereafter is a great addition to the standards.

Response: Licensing does not define treatment services according to YFT levels of care, so our rules are not intended to be exactly the same as YFT requirements. Also, YFT only applies to children in CPS conservatorship. Staff believe the continuation of current rule regarding the time line for reviews is important to ensure the child's stability in care and to ensure that the child's needs are evaluated and addressed regularly and appropriately. DFPS is adopting this rule with minor editorial changes only.

§749.1335. How do I review and update a service plan?

Comment: DFPS received three comments. One commenter stated that this rule is greatly expanded and is identical to requirements listed in Chapter 748. It was suggested that current requirements be utilized. One commenter suggested reviewing and possibly updating service plans as part of the debriefing process after each use of restraint. One commenter stated that paragraph (9) should be the next to last paragraph of the rule and therefore should switch with (10).

Response: DFPS is adopting this section with minor editorial changes only, including the change suggested by the last commenter. DFPS believes the requirements in this rule are important in developing a comprehensive review and update of a child's service plan. Reviewing and updating service plans as part of the debriefing process after each use of restraint would be labor intensive and a fiscal impact for most agencies at this time, so a change cannot be considered at this time.

§749.1339. How often must I re-evaluate the intellectual functioning of a child receiving treatment services for mental retardation?

Comment: One commenter stated that requiring that a psychologist determine the need and frequency for a child's intellectual functioning to be re-evaluated is a great addition to the standards and in children's best interests.

Response: This rule is being clarified further to require a child's intellectual functioning to be tested every three years (as opposed to every year) as required by the Texas Special Education laws and TEA. Additional editorial changes were also made.

§749.1361. What does "the transfer of a child in care" mean?

Comment: One commenter recommended waiving some of the admission/discharge paperwork when a child is moving between two operations located on the same property and owned by the same organization.

Response: DFPS is adopting the rule with changes to address the commenter's concern.

§749.1363. Who must plan a child's non-emergency discharge or transfer?

Comment: One commenter wanted clarification regarding the word "administrator" used in subsection (c) and whether this refers to the licensed child placing agency administrator. Child placement management staff should be allowed to approve discharges without the administrator's approval.

Response: DFPS is adopting this section with changes based on the comments. DFPS is adding "child placement management staff" to the list of professionals that can justify not providing advance notice of a discharge/transfer to a child not receiving treatment services. "Administrator" has also been clarified to be a "licensed child-placing agency administrator." Other editorial changes were also made.

§749.1367. To whom can I discharge a child in a non-emergency situation?

Comment: One commenter stated that parents may not always use good judgment and authorize the discharge of a child to someone who poses a danger to the child in the agency's opinion. Agencies should be required to use discretion and judgment in discharging a child to anyone.

Response: Generally, an agency does not have authority to withhold a child from a parent or a person authorized by the parent to take possession of the child. However, guidelines will be added

to the minimum standards publication regarding the agency's options to contact law enforcement or Child Protective Services if the agency believes the child is in danger. DFPS is making an editorial change.

§749.1369. How do I determine whether to discharge or transfer a child who is an immediate danger to himself or others?

Comment: One commenter stated that foster parents feel this will be very difficult for caregivers to accompany the child being discharged or transferred to the receiving entity or person due to their need to be with their other foster children.

Response: DFPS is adopting this section without changes. The rule already provides the option for the child placement staff to transport the child.

§749.1371. What must I document in the child's record regarding a planned discharge or transfer?

Comment: One commenter stated that discharge documentation is greatly expanded. It was recommended that current requirements be utilized.

Response: DFPS believes these requirements are necessary to ensure continuity of care for the child when discharging or transferring the child to another placement. DFPS is adopting this section with changes to make it more consistent with §749.1373.

§749.1373. When I discharge a child to another agency or residential child care operation, what information must I provide them?

Comment: DFPS received two comments. The commenters stated that discharge process is greatly expanded and is identical to requirements listed in Chapter 748. It was recommended that current requirements be utilized. One commenter stated that this rule is better written than §749.1133(b) and appreciated this subsection being included in the rules that address information that must be provided to the receiving operation. It was recommended that this terminology be used in §749.1133(b).

Response: DFPS believes these requirements are necessary to ensure continuity of care for the child when discharging or transferring the child to another placement. Regarding §749.1133(b), these rules deal with two different issues. It is unclear what the commenter is suggesting. However, several clarifications have been made in this rule and §749.1371 to make them more consistent.

§749.1375. To whom do I provide a copy of the discharge summary when I discharge a child to his home?

Comment: One commenter stated that this requirement is new requiring additional work that will have fiscal impact.

Response: DFPS believes this requirement is in the best interest of the child and is needed for continuity of care. The cost should be minimal, and DFPS is adopting this rule without change.

§749.1401. What general medical requirements must my agency meet?

Comment: One commenter was concerned that physicians may not accept Medicaid patients and did not want to require more paperwork of them other than official records.

Response: DFPS believes that this documentation is extremely important to the health and well-being of the child, and is adopting this rule without change.

§749.1405. Who must perform medical care examinations and provide medical treatment for a child?

Comment: One commenter stated that license "to practice medicine" limits this rule to medical doctors and doctors of osteopathy. This does not seem to be what is intended. The commenter recommended that the language be changed to licensed "to practice in an appropriate medical or health care discipline".

Response: DFPS is adopting this rule with changes based on the comment.

§749.1409. What general dental requirements must my agency meet?

Comment: DFPS received three comments. One commenter asked that refusal of dental treatment be added to the rule. Two commenters commended the standard.

Response: DFPS is adopting this section with a change based on the comment. This was a typographical error and "medical" is changed to "dental."

§749.1415. What health precautions must I take if a person in care, employee, caregiver, someone else in one of my foster homes, or someone else in my agency has a communicable disease?

Comment: One commenter stated that foster parents feel this should be the responsibility of the physician who determines the child/adult has a reportable communicable disease.

Response: Reporting and health precaution is everyone's responsibility. DFPS is adopting this rule with changes after extensive consultation with DSHS staff.

§749.1417. Who must have a tuberculosis (TB) examination?

Comment: DFPS received two comments. One commenter stated that further research is needed regarding TB testing. The commenter also asked why don't we follow the TB testing requirements that schools use since children are as likely to be exposed at school as in foster care. Comments were also received from DSHS regarding tuberculosis screening requirements.

Response: DFPS is adopting this rule with changes after extensive consultation with DSHS staff.

§749.1421. What immunizations must a child in my care have?

Comment: One commenter stated that the first two words of subsection (c) do not make sense.

Response: DFPS is adopting this rule with an editorial change to correct the error pointed out by the commenter.

§749.1433. How often must the physician review a child's primary medical needs?

Comment: One commenter stated that they agreed with the rule, but do not want to catch foster parents between regulations and physicians. Commenter suggested adding "If the child's physician recommends more or less than 90 days between examinations, the caregiver will document this in the child's file and comply with the doctor's orders".

Response: DFPS is adopting the rule with changes based on the comment.

§749.1435. What are the requirements for using a nasogastric tube?

Comment: One commenter said that any physician discharging a child with a nasogastric tube from the hospital will require the caregivers to show proficiency prior to discharge.

Response: DFPS is adopting this rule with a change to add that a physician may insert a nasogastric tube. DFPS believes it is necessary for the health and safety of children to ensure that only appropriate people insert nasogastric tubes.

§749.1461. What consent must I obtain to administer medications?

Comment: DFPS received seven comments. Six commenters questioned whether the "person legally authorized to give medical consent" referred to the CPS caseworker. One commenter asked; "What if the person legally authorized to give consent is not the foster parent? What liabilities are faced when that person is not immediately available to approve an antibiotic or increase in a medication to reverse an acute situation (i.e., asthma)."

Response: DFPS is adopting this rule with changes. The rule is written to comply with legislative requirements regarding consent. The revisions allow a general, "blanket" consent for medications (that can be signed at admission) in subsection (a), and change subsection (b) to require subsequent written consent for psychotropic medications that are new to the child. This should address the concern of the last commenter. Regarding the other commenters, this language is purposefully broad since not all children in regulated care are in the conservatorship of CPS, and the rule must apply to all children in care.

§749.1463. What medication requirements must caregivers meet?

Comment: DFPS received seven comments. Six commenters questioned whether the "person legally authorized to give medical consent" referred to the CPS caseworker. One commenter stated that foster parents cannot force foster children to take medications in the new proposed standards.

Response: DFPS is not making changes as a result of the comments. This rule is adopted with changes to clarify what portions of the rule apply only to "prescription" medication. Minor editorial changes are also made. Regarding the six comments, this language is purposefully broad since not all children in regulated care are in the conservatorship of CPS, and the rule must apply to all children in care. Regarding the last comment, the rule prohibits caregivers from physically forcing a child to take medication. DFPS believes that this is generally inappropriate and psychologically damaging to the child. Agencies may consider contacting Licensing to seek consultation or submit a variance request based on the unusual or unique circumstances of a particular child.

§749.1469. What are the requirements for administering nonprescription medication and vitamins?

Comment: DFPS received five comments. Four commenters stated that documentation of every vitamin and over the counter drug is not appropriate in foster family care. One commenter stated that OTC meds should be documented as to symptoms, dose, date and not used for secondary side effects like sleep side effect, etc., but not pre-approval for all OTC.

Response: DFPS is adopting this section with a change. "Over-the-counter medications and nonprescription vitamins" has been renamed to "nonprescription medications and vitamins." An operation may provide nonprescription medications and vitamins according to the directions as long as they are not contraindicated with other prescribed medications or the child's medical conditions. The paragraph on documentation is deleted because it is addressed in §749.1541.

§749.1521. What medication storage requirements must a foster home meet?

Comment: DFPS received seven comments. Two commenters felt that the need to require a locked storage that required a key was overkill for foster family homes. Two commenters asked why paragraph (7) has a timeline when (8) and (9) do not. One commenter asked that a tenth item be added: Provide medications to the person to whom the child is transferred or discharged if the child is still actively taking the medication.

Response: DFPS believes a double lock for controlled substances is necessary. However, DFPS is adopting this section with a change to clarify that medications "for external use only" do not have to be locked separately from other medications. Clarifications are also made when destroying medications. It has to be done in a manner that ensures a child does not have access to the medication. Another clarification requires the medication to go with a child upon discharge or transfer

§749.1523. What are the requirements for discontinued or expired medication?

Comment: DFPS received five comments. Two commenters stated that this is in conflict with the rule §749.1521 that says 90 days. Two commenters said that subsection (b) is too intensive as a documentation requirement. One commenter stated that, this instructs parents or staff to "properly destroy" medication, but does not identify how it should be done.

Response: DFPS is deleting one subsection and revising another as a result of the comments. Section §749.1521 was revised to address the inconsistency.

§749.1541. What records must caregivers maintain for each child receiving medication?

Comment: DFPS received 13 comments. Two commenters asked on what form must they keep the cumulative record. One commenter asked what about liquid medications. One commenter stated that over the counter medications and vitamins should not be included in this process. Several commenters said that this should be made only for children receiving treatment services. Two commenters said that foster parents feel that pill counts should only be for psychotropic medications.

Response: DFPS is adopting this rule with changes based on the comments. The requirement to include vitamins and nonprescription medications for children under 5 years old is deleted. Also, subsection (d) is deleted. Many editorial changes were made to this rule for clarification purposes and to make it easier to read. The requirements for recording dispensed nonprescription medications and vitamins has generally been deleted, except for nonprescription medication for children under five years old, and prohibited nonprescription medications and vitamins.

§749.1543. Where must a child's medication records be maintained?

Comment: One commenter stated that expecting foster parents to submit copies of medication records each month while they maintain copies for 90 days is unrealistic. Most foster parents do not have copiers or do not live in close proximity to the agency.

Response: DFPS is adopting this rule with changes based on the comment. Maintaining copies of medication records is reduced from 90 days to 30 days.

§749.1561. What is a medication error?

Comment: DFPS received two comments. One commenter stated that a child could have a medication error every time a new prescription was prescribed while waiting for CPS approval. One commenter stated that these should apply only to children receiving treatment services.

Response: No change is made based on the comments. Medication errors of any kind can be dangerous to the health and safety of any child. Therefore, it is important to have a written record of these incidents. DFPS is making a minor editorial change.

§749.1563. What must a caregiver do if the caregiver finds a medication error?

§749.1581. What must a caregiver do if a child has an adverse reaction to medication?

Comment: Six commenters questioned where this must be documented and on what form.

Response: The method of documentation is up to each agency. DFPS is adopting §749.1581 without change. DFPS is making a minor editorial change to §749.1563.

§749.1583. What must a caregiver do if a child experiences side effects from any medications?

Comment: Six commenters stated that it would be helpful to have the differences between "adverse reaction" and "side effect" outlined.

Response: DFPS is adopting this rule without changes. The difference between adverse reactions and side effects should be part of medication training curriculum at all operations.

§749.1603. If my agency employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give consent before requesting his consent for the child to be placed on psychotropic medication?

§749.1605. If my agency does not employ or contract with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give medical consent prior to the health-care professional prescribing psychotropic medications to a child in care?

§749.1607. What are the requirements if a physician orders administration of a psychotropic medication to a child in an emergency?

§749.1609. What information must be documented about a child's use of psychotropic medication?

§749.1611. If my agency employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what are the requirements for evaluating whether a child should continue taking a psychotropic medication?

Comment: DFPS received five comments regarding §749.1603 through §749.1611. One commenter was concerned that Medicaid will not pay for the extent of these services. Recommended removing section §749.1603(a) - (c) and only require providing the person designated to provide legal consent for medication with access to the child's record and require the physician to provide information to the person giving medical consent. One commenter was concerned that informed consent is between the prescribing physician and the person authorized to give consent, and that these rules put agencies at risk to require them to explain medical treatment and be in the middle. One commenter asked the question, "How will this be monitored in light of the requirements for the medical consenter?" One commenter was concerned that foster parents were not qualified to assess the effectiveness of medication. One commenter was concerned about the foster parents having to record daily the giving of Ritalin, since it is so common for foster children.

Response: Psychotropic medications are particularly powerful and life-affecting. Children are better protected from unnecessary medications when their parents and/or managing conservators are provided with adequate information to inform their consent of those medications. DFPS staff believe that child-placing agencies and foster parents ought to be responsible for working with parents and/or managing conservators before placing children on medications. There was some confusion over §749.1603 and §749.1605, and which rule applied to prescribing doctors not associated with the agency. In a situation where the agency does not employ or contract with a doctor that prescribes the psychotropic medication, then §749.1605 applies. DFPS did delete §749.1601 because it was confusing and was addressed in other rules. DFPS has also clarified two issues in §749.1461: a general consent may be obtained to administer routine, preventive, and emergency medications; and consent for psychotropic medications does not have to be obtained for dosage changes, only new medications. DFPS did make some editorial changes to §749.1609 and §749.1611.

§749.1641. What is a protective device?

Comment: One commenter asked if written doctor's orders must be obtained for bed-rails, helmets, and mittens since these are common safety items that any responsible, loving parent would choose to use.

Response: DFPS is adopting this section with a change to allow bed rails to be used for young children and not be counted as a protective device. Current rule requires a physician's order for any protective or supportive device. The intent of this rule is to ensure protective devices for children who have primary medical needs or other treatment needs are necessary before they are used to protect the health and safety of the children.

§749.1645. May I use protective devices?

Comment: DFPS received two comments. The commenters were concerned that this could eliminate the use of toddler beds and bed rails to protect children from falling out of bed while they learn to sleep in a regular bed. The commenters stated that many bunk beds have rails that go all the way across for safety purposes.

Response: The subsection regarding bed rails is deleted based on the comments.

§749.1673. May I use supportive devices?

Comment: One commenter asked if this include wedges to correctly position infants for sleeping.

Response: No change is made as a result of the comment because a "wedge" would not meet the definition of a supportive device as outlined in §749.1671. However, DFPS is adopting

this rule with changes to provide consistency with §749.1645 regarding protective devices.

§749.1801. What do certain words mean in this division?

Comment: One commenter stated that any equipment not used properly can be dangerous. If it is on the market and considered safe, they should not be restricted from using it.

Response: Licensing has researched these requirements and is following the recommendations of the American Academy of Pediatrics. DFPS is adopting this rule without change.

§749.1803. What are the basic care requirements for an infant?

§749.1841. What are the basic care requirements for a toddler?

Comment: DFPS received 16 comments on both rules. Commenters felt that implementation of this standard as written would require audio and video monitors which would have a fiscal impact. One commenter stated that monitoring systems used in more than one room of the house interfere with each other and that this will be virtually impossible to do, it increases cost for a foster family.

Response: DFPS is adopting these rules with a change to clarify that a caregiver can be within eyesight or hearing range of the child. There is no fiscal impact because neither audio or video monitors are required.

§749.1805. What furnishings and equipment must I have in an infant care area?

Comment: One commenter stated that a "sufficient" number of toys is too vague and ill defined.

Response: DFPS is adopting this rule without change. Compliance with this rule will be assessed on a case-by-case basis depending on the age, developmental level, and other characteristics of the child.

§749.1813. What types of equipment may a foster home not use with infants?

Comment: DFPS received 15 comments. Three commenters felt that baby walkers could be used safely with children, at least those eight or nine months old. Several commenters stated that bumper pads that are appropriately secured in cribs should not be a problem and they should be allowed for infants three months old or older. Three commenters stated that some primary medical needs children require foam wedges by order of physician or therapist. Two commenters asked if "soft bedding" (including quilts and comforters) is not to be used, what would be an acceptable and appropriate cover to put on the child. One commenter felt this requirement was too intrusive and did not allow a child to be put to bed with a favorite stuffed toy.

Response: DFPS has researched the equipment prohibited in this rule, including baby walkers, and is following the recommendations of the American Academy of Pediatrics. The restrictions on soft bedding including stuffed toys, are intended to prevent SIDS deaths and are recommended by the American Academy of Pediatrics. DFPS is adopting this rule with minor editorial changes, including a revision that clarifies children cannot sleep on foam "pads," but the rule does not preclude foam "wedges."

§749.1815. Are infants required to sleep on their backs?

Comment: DFPS received nine comments. Several commenters stated that this group of regulations, §749.1815 through §749.1819, is covered when you certify that a foster parent has had the training on SIDS and the section should be deleted. Providing instructions for covering an infant's head, sleeping position etc., is not needed. This needs revision to allow for doctor's orders, etc.

Response: DFPS is adopting this section with a change "unless a health-care professional orders otherwise." This is recommended by the American Academy of Pediatrics and Licensing believes that these requirements are reasonable and important for the health and safety of children.

§749.1819. What are the specific requirements for feeding an infant?

Comment: DFPS received six comments. Several commenters stated that foster parents feel this is a day care standard, not appropriate for family care when they will only have one or two infants in their home at one time, and not family friendly.

Response: Foster homes should already be voluntarily meeting these standards. The requirements in subsections (b) and (c) are necessary for bonding and attachment purposes. The requirements in subsection (d) are needed for health and safety reasons. DFPS is deleting the requirement to label bottles and training cups.

§749.1861. What information must I provide a pregnant child regarding her pregnancy?

Comment: DFPS received two comments. One commenter asked that the section be changed to say "Pregnant child or youth." One commenter stated that the physician's paperwork, WIC participation, etc., should suffice without additional documentation by the foster parent.

Response: Paragraph (4) is deleted based on the second comment. In response to the first comment, Licensing does not use the term "youth." "Child," as used in this chapter, is understood to mean a child, teenager, or youth in care.

§749.1863. Is the use of emergency behavior intervention of a pregnant child permitted in a foster home?

Comment: One commenter commends DFPS for specifically addressing this critical issue.

Response: DFPS is adopting this rule without change.

§749.1891. What responsibilities do I have for the education of a child in care?

Comment: DFPS received three comments. Two commenters asked for clarification regarding the requirement for a school liaison. One commenter stated that this should be required for all children in school regardless of their need for treatment services, as they all have needs due to being in substitute care. One commenter stated that this standard appears to eliminate the possibility of "home schooling" by foster parents.

Response: DFPS is revising this rule to address the concern of the last commenter. At this time, no change is made regarding the requirement for a school liaison. The requirement was written in broad language so that each agency could determine how it would comply. While DFPS agrees that a liaison for all children is a good idea, DFPS believes having a liaison for children with special education needs is vital. In addition, the rule does not preclude an agency from providing liaisons for all children.

§749.1921. What responsibilities do foster parents have for providing a child with opportunities for recreational activities?

Comment: DFPS received four comments. Two commenters felt this should be required only for children receiving treatment

services. Two commenters stated that some foster parents feel this is not family friendly for children receiving child care services and creates excessive documentation for the foster parents. Three commenters said that for subsection (c), foster parents will need medical orders for children who are non-ambulatory when using a "variety of body positions." These positions are recommended by Occupational and Physical Therapists and signed by the child's physician.

Response: The subsection requiring documentation of a written plan for recreation is deleted based on commenter concerns. Regarding the last set of commenters, the required physician orders can be obtained at admission, as orders are required for these children in §749.1135(3). Other editorial changes have also been made.

§749.1953. May I use corporal punishment for children in care?

Comment: DFPS received six comments. The commenters stated that a point to consider is the use of "strong sitting", which is a static therapeutic sitting positioning strongly recommended by RAD specialist Nancy Thomas and yet it would not be allowed as stated here.

Response: DFPS is adopting this rule without change. An agency may consider requesting a variance based on the unique needs of a particular child.

§749.1957. What other methods of punishment are prohibited?

Comment: DFPS received seven comments. Several commenters agree that maintaining an uncomfortable physical position, such as standing in a corner, is inappropriate discipline. One commenter stated that as this reads, a child could never stand in a corner or receive time-out in a chair. DFPS should also address what forms of discipline would be acceptable.

Response: Based on comments, DFPS is adopting this section with changes. DFPS is deleting the prohibition against children standing in a corner, and deleting "harsh" from paragraph (9). DFPS is adding that shaking is prohibited to be consistent with §749.1003(b)(5)(A).

§749.1959. To what extent may a caregiver restrict a child's activities as a behavior management tool?

Comment: One commenter stated that the requirements in this rule are unrealistic. The commenter also expressed concern with subsection (d) requiring the service planning team approval for restriction to a room for more than 24 hours and how this would be enforced by Licensing staff.

Response: DFPS is adopting this section with changes based on the comments. DFPS is revising subsection (b) to allow restrictions for up to 30 days, previously it was seven days. Subsection (c) regarding restrictions on communications and visits with family is deleted to allow more flexibility for the caregivers when imposing restrictions.

§749.2051. What types of emergency behavior intervention may I administer?

Comment: One commenter suggested that a clinician be available by phone to assess if a child's behavior meets the criteria for an emergency behavior intervention.

Response: DFPS is not revising the rule as a result of comment. The commenter's suggestion would most likely result in a negative fiscal impact for agencies. DFPS is adopting the rule with the addition, as a clarification, that use of protective and support devices is not considered emergency behavior intervention.

§749.2059. What is the appropriate use for a short personal restraint?

Comment: One commenter suggested that restraint not be allowed for disruptive behaviors.

Response: DFPS is not revising the rule as a result of comment. Licensing will continue to allow short personal restraint for disruptive behaviors according to the requirements of this rule, as this is currently allowed and can prevent disruptive situations from escalating. However, DFPS is clarifying that a short personal restraint must end immediately after a danger is averted.

§749.2061. What precautions must a caregiver take when implementing a short personal restraint?

Comment: Six commenters asked about the use of supine restraints.

Response: DFPS is adopting this rule without change based on the comments. Prone and supine restraints are specifically addressed throughout Subchapter L. Agencies may request technical assistance from Licensing if they have questions about prone and supine restraints. DFPS is making minor editorial changes including deleting the example of "basket holds."

§749.2101. Are written orders required to administer emergency behavior intervention, and if so, who can write them?

Comment: One commenter expressed confusion about when an order is required for personal restraint.

Response: DFPS is adopting this rule with a change to clarify when orders are required for personal restraints. Orders are only required for personal restraints under specific circumstances. The revision clarifies when orders are required and ensures better consistency with other rules.

§749.2103. Must the written order be in a child's record before a caregiver can use an emergency behavior intervention on an child?

Comment: Six commenters had the same questions about how to comply with this rule.

Response: DFPS is adopting this rule without change. The revision to §749.2101 should address most of the commenters' questions. Agencies may request technical assistance from Licensing if they have questions about the rules.

§749.2105. What information must a written order include?

Comment: DFPS received eight comments. The commenters had clarification questions about this rule, six of them with the same question.

Response: The majority of this rule is taken from current minimum standards. The revision to §749.2101 should address many of the commenter questions. Agencies may request technical assistance from Licensing if they have questions about these rules. In addition, an order for an individual restraint does not need to include directives that cover a period of days, therefore, these requirements are moved to §749.2107, which addresses PRN orders.

§749.2107. Under what conditions are PRN orders permitted for a specific child?

Comment: One commenter asked a clarification question about this rule.

Response: The revision to §749.2101 should address the commenter's question. DFPS is also moving two subsections form §749.2105 as described in the response above.

§749.2151. What responsibilities does a caregiver have when implementing a type of emergency behavior intervention?

Comment: One commenter suggested that the agency not be required to explain to the child the behaviors he must exhibit to be released from restraint or have the restraint reduced.

Response: DFPS is adopting the rule without change. It is often helpful for children in crisis to receive specific verbal instructions about how to calm down and what behaviors will result in the restraint ending.

§749.2201. Who must monitor a personal restraint?

Comment: One commenter suggested a requirement that the person who is monitoring a child in restraint not be involved in the application of the restraint.

Response: DFPS is adopting this rule without change. The commenter's suggestion is not a realistic requirement in foster homes.

§749.2283. Can a caregiver exceed the maximum length of time that an emergency behavior intervention can be administered to a child?

Comment: DFPS received seven comments. The commenters had concerns about how to comply with the requirements of this rule.

Response: DFPS is adopting this rule without change. It reflects current minimum standard requirements. Agencies should already be in compliance with this rule.

§749.2301. What follow-up actions must caregivers take after the child's behavior no longer constitutes an emergency situation?

Comment: One commenter had concerns about having to comply with this rule for short personal restraints.

Response: Subsection (f) exempts short personal restraints. DFPS is adopting this rule with minor editorial changes.

§749.2305. When must a caregiver document the use of an emergency behavior intervention, and what must the documentation include?

Comment: One commenter had concerns about having to comply with this rule for short personal restraints.

Response: Subsection (d) exempts short personal restraints. The section is adopted with editorial changes.

§749.2331. What circumstances trigger a review of the use of emergency behavior intervention for a specific child?

Comment: One commenter expressed concern that this rule does not require review of all emergency behavior interventions.

Response: DFPS is adopting this rule without change. The commenter's concern is addressed in §749.1335(a), which requires a review of emergency behavior interventions during the service plan review or update.

§749.2383. What data must be collected?

Comment: DFPS received three comments. One commenter suggested exempting short personal restraints from this requirement. Two commenters asked about how this information will be reported.

Response: This rule is adopted with a change based on the first comment. Short personal restraints are exempted from this reporting requirement. A procedure for reporting this information will be developed at a later date.

§749.2441. Can I verify foster homes anywhere in the state?

Comment: DFPS received six comments. One requested a definition of "permit." The other five expressed concern about the rule's potential impact, including cost and limitation on expansions. Three commenters stated that the new rules regarding branch offices sufficiently addressed problems with larger agencies. One commenter at the April 7, 2006, DFPS Council meeting suggested using DFPS regions to limit agency permits rather than the proposed limit of 40 contiguous counties.

Response: DFSP is adopting this rule with a change to limit CPA permits according to DFPS regions (rather than 40 contiguous counties) as suggested by a commenter. The limit to CPA permits is beneficial to large agencies, in that remedial action necessary due to deficiencies at one branch office will now affect offices in only that office's region rather than statewide. Regarding the comment on the definition of "permit", this definition can be found in rule §745.21.

§749.2443. Do the requirements described in §749.2441 of this title (relating to Can I verify foster homes anywhere in the state?) apply to the counties in which I place children for adoption?

Comment: One commenter expressed confusion about how this rule would be enforced.

Response: DFPS is adopting this rule without change. Section 749.2441 only applies to the verification of foster homes, not the approval of adoptive homes. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.2447. What information must I obtain for the foster home screening?

Comment: DFPS received three comments. One commenter expressed concern about verifying illegal aliens as foster parents, one commenter wanted the requirement for substance abuse history information limited to persons 14 years old or older, and one commenter requested an editorial change.

Response: DFPS is adopting this section with changes, including editorial changes. DFPS is clarifying that the language(s) spoken by each prospective foster parent must be documented. The language regarding illegal immigrants is deleted, however, there are no regulatory restrictions regarding a persons immigration status. The requirement for substance abuse history information is in a portion of the rule related to general physical and mental health status, which applies to person of all ages in relation to the family's ability to provide foster care.

§749.2471. What must I do to verify a foster home?

Comment: DFPS received comments from DSHS regarding tuberculosis screening requirements.

Response: DFPS clarified the paragraph on tuberculosis screening by referencing §749.1417, which has been rewritten based on comments from DSHS. This rule has also been clarified by adding a paragraph with enumerated items that must be listed on a verification certificate.

§749.2473. What must I do to verify a foster home that another child-placing agency has previously verified?

Comment: DFPS received three comments. The commenters expressed concern about the portion of the rule that requires an agency, before verifying a new foster home, to ensure that an agency which previously verified the foster home completed all investigations and addressed and resolved all deficiencies.

Response: DFPS is adopting this section with changes based on the comments. Instead of ensuring "the previous agency completed all investigations", you must now "ensure that any unresolved deficiencies have been addressed." The paragraph regarding tuberculosis screening has also been clarified.

§749.2475. To whom must I release information regarding a family on which I previously conducted a foster screening, pre-adoptive home screening, post placement adoptive report, or home study?

Comment: DFPS received three comments. Two commenters expressed concern about agencies allegedly manipulating release of information rules in order to delay transferring a foster home to another agency. One commenter asked a clarification question about the rule.

Response: DFPS is adopting this section with changes based on the comments. While Licensing cannot prevent agencies from attempting to manipulate minimum standard requirements, this rule has been reworded to require the release of background information, including general information about unresolved investigations and/or deficiencies, within 10 days of the receipt of the request. The remaining information regarding the unresolved investigations and/or deficiencies must be subsequently released within 10 days of the resolution of the investigations and/or deficiencies. This rule has also been revised to include releasing background information to an independent contractor. There were many editorial changes to clarify that this rule applies to foster home screenings, pre-adoptive home screenings, post placement adoptive reports, and home studies; and to clarify what is meant by background information.

§749.2485. What are the requirements for verifying a foster home at a residence that I own?

Comment: One commenter expressed confusion about the rule.

Response: DFPS is adopting this rule without change. This rule is consistent with the definition of a foster family home, which requires the home to be the foster parents primary residence. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.2487. What are the requirements for an agreement that I have with a foster home that I verify?

Comment: One commenter expressed concern about the portion of the rule that prohibits a foster home from providing 24-hour care of any non-relative children not placed by the agency. The commenter asked how this affects slumber parties or extended visits with friends.

Response: DFPS is adopting the rule with changes to address the commenter's concern.

§749.2489. What information must I submit to Licensing about a foster home's verification status?

Comment: One commenter expressed concern that two working days is unrealistic for submitting information to Licensing about foster home verifications.

Response: DFPS is adopting this rule without change. Agencies can now submit this information to Licensing via the DFPS web site.

§749.2493. May a foster family provide day care in addition to foster care?

Comment: One commenter expressed concern about this rule based on misinformation about Licensing's policies for allowing day care in foster homes.

Response: DFPS is adopting this rule without change. If agencies need more information about combining day care with foster care, they can contact Licensing for technical assistance and/or review §745.375, which addresses this issue.

§749.2551. What is the maximum number of children a foster family home may care for?

§749.2553. What is the maximum number of children that a foster group home may care for?

Comment: DFPS received five comments regarding these rules. Regarding §749.2551, one commenter complimented the rule, one commenter had a question about the rule, one wanted the capacity calculated based on the number of children in the home "at any given time," and one expressed concern about how the rule may impact the number of foster care beds. Regarding §749.2553, there was a clarification question.

Response: DFPS is not revising the rule based on the comments. These two rules are in compliance with the statute regarding the capacity of foster homes. However, because this issue has been interpreted differently over the years, a fiscal impact analysis for each rule was done. The survey that was conducted indicated that for §749.2551, 87% of the current foster family homes were in compliance. The survey that was conducted indicated that for §749.2553, 75% of the current foster group homes were in compliance. Editorial changes have been made to this rule, including changing "children of the foster family" to "children of the caregivers who live in the foster home."

§749.2557. May an foster home exceed its verified capacity?

Comment: One commenter had clarification questions about the rule.

Response: DFPS is making editorial changes to the rule, including changing "children of the foster family" to "children of the caregivers who live in the foster home."

§749.2559. How do I determine the child/caregiver ratio for a foster home?

§749.2561. How many infants may a foster family home care for?

§749.2563. How do I determine child/caregiver ratio for a foster group home?

Comment: DFPS received 16 comments regarding these rules. Five commenters expressed concern about the fiscal impact of ratio changes. Eight commenters expressed concern about decreased capacity in foster homes as a result of ratio changes. Four commenters requested that ratios not change from current requirements, and two commenters suggested removing ratios from the rules completely. One commenter requested that the limit on infant care be changed to reflect the number of infants in the home "at any given time." One commenter suggested that the limit on infant care should be higher for homes in which at least one parent is at home during the day.

Response: DFPS is not revising the rules as a result of comments. Caregivers' availability to supervise and interact with children is the most significant factor in reducing risk in child-care and providing children the care and attention they need. DFPS has only lowered the ratio for children under the age of five and for children receiving treatment services, both populations that require increased supervision and attention. These ratios are consistent with several other states and fall below the recommendations of the Child Welfare League of America. DFPS feels the benefit of stronger ratios outweighs the fiscal impact. DFPS is making a minor editorial change to §749.2561.

§749.2593. What responsibilities does a caregiver have when supervising a child?

Comment: DFPS received two comments. One commenter expressed concern that the rule is too prescriptive. Another commenter suggested requiring progress notes for all children in foster care, not just children receiving treatment services.

Response: DFPS is adopting the rule with changes to make the rule somewhat less prescriptive without compromising the health and safety of children in care. Progress notes for all children in foster homes is overburdensome and not possible at this time.

§749.2595. May I use a video camera to supervise a child in the child's bedroom?

Comment: DFPS received two comments. The commenters requested that video monitoring be allowed as long as children change clothes in private, the foster home uses a closed-circuit system, and the images are not taped.

Response: DFPS is adopting this section with changes, expanding the list of examples of situations which would allow for video monitoring, adding that each child must have another location where he can change clothes, and clarifying that video cameras may not be used to tape the child and images may not be accessible except to the foster home's caregivers.

§749.2599. Can a child serve as a caregiver?

Comment: One commenter stated that this is a good rule.

Response: DFPS is adopting this rule without changes.

§749.2621. What are "respite child-care services"?

Comment: DFPS received nine comments, all requesting clarification to this rule, including how it relates to CPS contract requirements.

Response: Not all children in regulated care are placed by CPS. Therefore, Licensing requirements and CPS requirements are necessarily and appropriately different in some areas. DFPS is adopting the rule with only editorial changes.

§749.2629. In addition to the requirements of this division, what requirements of this chapter apply to respite child-care that a foster home provides?

Comment: One commenter expressed concern about the requirement that respite care must comply with capacity and child/caregiver ratios and supervision rules.

Response: Capacity, ratio, and supervision are basic safety rules. Children are more at risk in homes where these minimum requirements are not met. DFPS is adopting the rule with only editorial changes.

§749.2631. How long may a child be in respite child-care?

Comment: DFPS received six comments. Three commenters requested clarification to this rule, including how it relates to CPS contract requirements. Three additional commenters requested that the time limits on respite care not apply when a child is in respite care due to an abuse/neglect investigation.

Response: DFPS is adopting the rule with changes based on the comments. This section adds that a child may remain in temporary substitute care for up to 60 days while the child's foster home is under investigation for abuse or neglect. This does not count toward nor is it limited by the 14 consecutive days or 40 days each year time frames for respite child-care services.

§749.2633. How frequently may a foster home provide respite child-care services?

Comment: DFPS received four comments. The commenters expressed concern about the required 10-day period between respite placements in a foster home.

Response: DFPS is adopting the rule with a change based on the comments. The 10-day limit between foster home respite placements has been deleted. There are other editorial changes and a clarification regarding placements for abuse and neglect investigations. See response to §749.2631.

§749.2653. What are the requirements for an unrelated adult to reside in a foster home?

Comment: DFPS received comments from DSHS regarding tuberculosis screening requirements.

Response: DFPS is adopting this rule with changes based on the comments. The rule now references §749.1417, which has been significantly revised in accordance with DSHS recommendations.

§749.2805. What is a "major life change in the foster home"?

Comment: One commenter asked a question about the requirements of this rule.

Response: DFPS is adopting this rule without changes. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.2815. How often must I have supervisory visits with the foster home?

Comment: DFPS received nine comments. One commenter requested that the term "contact" be clarified in this rule. Two commenters expressed concern about the requirement for one annual unannounced visit for each foster home. Six commenters asked about the applicability of this rule to empty foster homes, which is addressed in §749.2817.

Response: DFPS is clarifying the term "contact" by changing it to "visit." This same change is made in §749.2817. Unannounced visits are a recognized and appropriate method of monitoring foster homes. No change is made regarding the unannounced visit issue, however, other editorial changes are also made.

§749.2817. Must I monitor and have supervisory visits with a foster home where no children are placed?

Comment: One commenter requested that empty homes only be visited prior to making a placement.

Response: DFPS is not making changes to the requirements of this rule. With increasing emergency placements in foster homes, agencies must ensure that these homes are ready to

accept placements. No change is made regarding this issue. DFPS is revising "contact" to "visit" throughout the rule.

§749.2821. How do the foster parents meet their training requirements while their home is on inactive status?

Comment: One commenter asked a clarification about this rule.

Response: DFPS is adopting this rule without change. Agencies may request technical assistance from Licensing if they have questions about the language in this rule.

§749.2823. Are background checks required on homes that are on inactive status?

Comment: One commenter suggested that background checks only be required of homes being taken off of inactive status if the last background checks were more than two years old, as this is the required schedule for background checks on active homes.

Response: DFPS is adopting the rule with changes based on the comment and to make the rule more consistent with other background check rules.

§749.2903. Who must conduct fire and health inspections at a foster home?

§749.2905. How often must a inspection be conducted at a foster home?

Comment: DFPS received seven comments. Four commenters stated that foster parents are very upset at the cost of these inspections and they are getting higher every year. Two commenters stated these inspection services are available but cost $50 - $300, which is not reimbursed to foster parents. Three commenters asked that the rule be changed to use the documentation for all of an agency's foster homes in the area. One commenter recommended using the previous standard clarification, which states that if an entity charges for the inspection, then the state fire marshal or state health department should be contacted, and if they cannot conduct the inspection, the agency can use the DFPS checklists. One commenter said that the rule is inconsistent because fire and health inspections are required every two years, but they must check every year to determine if the state or local authorities can conduct inspections.

Response: To ensure the health and safety of children, DFPS believes inspections are important and necessary, and when state or local inspections cannot be obtained, then there must be regular attempts to have these done. However, DFPS is adopting these rules with changes based on the comments. DFPS is clarifying that once an agency documents that there is not entity to conduct a fire and/or health inspection, then the agency may use that documentation for any foster home verified by you in that area. The documentation is valid for one year.

§749.2907. What disaster and emergency plans must each foster home have?

Comment: DFPS received two comments. One commenter asked that this rule define "transportation emergencies". One commenter stated that it is a good idea for foster parents to be required to write a plan for emergencies in their homes but the rule needs more specifics if you want it done consistently.

Response: DFPS is adopting this rule without change. DFPS believes that CPAs can make this determination for themselves. The type of plan and what is included in the plan will depend on the location and type of the foster home. These plans should be individualized to each foster home.

§749.2911. How must smoke detectors be installed and maintained at a foster home?

Comment: One commenter stated that saying that smoke detectors must be in good working condition at all times should be ample without dictating that batteries be changed annually.

Response: DFPS is adopting the rule with changes based on the comment.

§749.2913. How many fire extinguishers must a foster home?

Comment: One commenter stated that a fire inspector recommended keeping a fire extinguisher in the parents' bedroom to be used to reach children upstairs in case of a fire and asked that the rule be changed with this language in it.

Response: DFPS is adopting this rule without changes. Older foster children may be able to use a fire extinguisher, so DFPS would not want to write a rule that required the extinguisher to be inaccessible to them. Foster parents will need to choose locations for extinguishers based on the floor plan of their home and the ages/needs of their children.

§749.2917. What are the requirements for animals that are present at a foster home?

Comment: One commenter objected to the rule because they said that the wording of the rule makes it seem like a foster home would have to give up a pet if the foster child developed an allergy to the pet. The commenter recommended keeping subsection (c) only.

Response: DFPS is adopting this rule with some changes based on the comment.

§749.2931. What policies must I enforce regarding tobacco products?

Comment: DFPS received four comments. One commenter expressed concern due to his 'chewing' on a cigar but never smoking it and he feels he should be able to do this in his home or car with foster children present. Several commenters voiced their concerns regarding the department regulating legal activities that foster parents do in their own homes--that it is going to be hard to monitor, is impractical, and will eliminate placements for children which are otherwise in their best interest. Homes should be able to develop a plan with designated smoking area in the home and/or a plan to abstain from smoking in vehicles while children in care are present.

Response: DFPS is adopting this rule with changes to allow foster parents more flexibility in using smokeless tobacco without directly impacting the health of children in care.

§749.2961. Are weapons, firearms, explosive materials, or projectiles permitted in a foster home?

Comment: DFPS received three comments. Several comments were received about law enforcement officers, Border Patrol staff, etc. who are required to carry their weapons and who have weapons at home. There was also concern about rural families who need a gun due to wild/rabid animals, poisonous snakes, etc. One commenter stated that there are some children at a moderate service level for whom it would be appropriate to participate in activities such as hunting or paintball in supervised and appropriate settings.

Response: DFPS is adopting this rule with some changes based on the comments. The proposed prohibition against weapons is only for foster parents that provide treatment services; there is

not a prohibition for foster parents providing only child-care services. However, DFPS is clarifying that the prohibition does not apply to foster parents that are law enforcement officials. No change is made regarding children at the moderate level. For children at that level where activities involving weapons may be appropriate, the children should not meet the definition of treatment services - so they would already be able to participate in these activities. Based on a comment from Chapter 748, when appropriate, "qualified adults" (the rule previously said "caregivers") may supervise children during activities involving weapons.

§749.2967. May a caregiver transport a child in a vehicle where firearms, other weapons, explosive materials, or projectiles are present?

Comment: DFPS received four comments. Commenters felt this interfered with the Concealed Handgun Law and with a person's right to bear arms. Commenters also felt this leaves out law enforcement officials and rural families who need a gun due to wild/rabid animals, poisonous snakes, etc.

Response: DFPS is adopting with some changes based on the comments. The rule now allows foster parents employed as law enforcement officials to have a work issued handgun in their vehicle. Foster parents are frequently held to a higher standard than average citizens because they are taking responsibility for someone else's children who have been abused or neglected.

§749.3023. Which rooms in the home may not be used as bedrooms?

Comment: One commenter said that this should be a standard with a grandfather clause as this will limit capacity. Also, for foster parents offering transitional living services, they often use detached structures as the living quarters for the youth.

Response: DFPS is adopting this rule without change. Waivers to the rules for situations like the one described can be requested. See also §749.2597 for options regarding children receiving transitional living services.

§749.3027. May a child in care share a bedroom with an adult caregiver?

Comment: One commenter said that "comfortable sleeping arrangements" is a subjective description and requested examples of what "comfortable" might include.

Response: DFPS believes that this rule is sufficiently clear as stated, and is adopting without change.

§749.3035. What bathroom accommodations must a home have?

Comment: Seven commenters were concerned with the requirement to clean the bathroom daily and felt it detracted from the purpose of being in a home setting.

Response: DFPS is deleting the requirement to clean the bathroom daily, and is making other editorial changes.

§749.3037. What are the requirements for indoor space that children can use?

Comment: DFPS received two comments. One commenter stated that these requirements are too restrictive. One commenter stated that the requirement for square footage will reduce the number of foster family placements for children in care. 40 square feet of play area/child means that a foster family caring for six children must have 240 sq ft., the equivalent of a 15 x 16 feet room. That will eliminate a number of foster home placements.

Response: This rule is taken from current minimum standards. DFPS is adopting this rule without changes.

§749.3039. What are the requirements for outdoor recreation space and equipment?

Comment: DFPS received five comments. Two commenters asked about basketball, skateboards, etc., on asphalt and suggested deleting subsection (d), which requires that play equipment not be installed over asphalt. Commenters also suggested deleting subsection (a): Outdoor activity areas must be arranged so that caregivers can supervise activities.

Response: DFPS is adopting this rule with changes in response to comments. Subsection (a) is deleted. The subsection regarding "equipment over asphalt" is clarified to exclude basketball and skateboarding by revising the language to "climbing equipment, swings, and slides." Other minor editorial changes are also made.

§749.3061. What are the requirements for feeding children in care?

Comment: One commenter asked that the rule be changed to say that food needs to be "made available" and not that food must be served.

Response: DFPS is adopting the rule with changes. Subsection (d) now reads: No more than 14 hours may pass between the last meal or snack of the day and the availability of the first meal the following day.

§749.3063. What types of food and water must caregivers provide children?

Comment: Two commenters were concerned that it would require a doctor's order to give a child a vitamin and feel this needs to be taken out.

Response: DFPS is revising this rule with changes based on the comments.

§749.3065. What must the caregiver do if a child refuses to or cannot eat a meal or snack that is offered?

Comment: Six commenters asked for clarification about what is meant by discussing with a child's "parent."

Response: DFPS is adopting this rule without changes. "Parent," as defined in Chapter 745, includes the managing conservator. It is appropriate to discuss a child's eating problems with the parent.

§749.3069. May caregivers offer a child in care different food choices than what the family is eating?

Comment: DFPS received eight comments regarding §749.3069. Commenters said that in the initial placement period the foster parents may not know about a child's strong likes and dislikes or food allergy. One commenter said that there should be exceptions made for parents who have special dietary needs, children who are fed through gastrostomy tubes, and toddlers just beginning to eat solids.

Response: DFPS is adopting this rule with changes based on the comments. The intent of this rule is to ensure foster children are not deliberately treated differently from other family members. The changes will ensure flexibility for the caregivers in meeting this requirement.

§749.3073. What are the nutrition requirements for a child with primary medical needs?

Comment: DFPS received two comments. One commenter stated that prescribing physicians often plan the diet. Dieticians are rarely in physician's offices who prescribe enteral feedings. Dieticians typically see patients in the hospital. Nutritionists are more often in the physician's office. Dietician or nutritionist may not be consulted by the physician.

Response: Based on the comments, DFPS is adopting this rule with a change to include a licensed physician.

§749.3075. What food service practices must caregivers use for children receiving treatment services for primary medical needs or mental retardation?

Comment: One commenter stated that families feed babies in the family room or in cribs for night feedings depending on the needs of the child. Some primary medical kids do not want to sit at the table with everyone else while they eat hotdogs and fries and they have to be tube fed. This is too restrictive for a family setting.

Response: DFPS is adopting this rule with changes to clarify which children this rule applies to.

§749.3077. What are the requirements for tube-feeding formula?

Comment: DFPS received two comments. One commenter stated following health care professional instructions and manufacture's recommendations should be sufficient. The other commenter stated that a nutritionist will be in the gastroenterologist's office. This physician will consult whomever he or she is confident can instruct the caregiver.

Response: Based on the comments, DFPS is adopting this rule with changes to be more flexible and consistent with other rules.

§749.3079. What are the requirements for storing food?

Comment: DFPS received six comments. Commenters asked for clarification of storing unopened food containers.

Response: DFPS believes that the rule is sufficiently clear as written, and is adopting without changes.

§749.3105. May children transport other foster children?

Comment: One commenter stated that this is a good rule and to clarify if foster children can transport other foster children.

Response: DFPS is adopting this rule without changes. This clarification is stated in the rule.

§749.3107. May caregivers teach or supervise foster children in learning to drive?

Comment: One commenter stated that this is a good rule.

Response: DFPS is adopting this rule without change.

§749.3131. Who is responsible for complying with the requirements in this subchapter?

Comment: One commenter stated that the standards requiring swimming pools and water safety are much clearer in the proposed standards.

Response: DFPS is adopting this rule without change.

§749.3133. What are the requirements for a pool at a foster home?

Comment: One commenter asked for clarification if the house can form one side of the barrier to the pool.

Response: Based on comment, DFPS is adopting this rule with a change by including "fence or wall."

§749.3137. What are the child/adult ratios for swimming activities?

Comment: DFPS received two comments. One commenter stated that foster parents feel the 1:1 with a baby in the water precludes foster parents from taking an infant with their 14-year-old on swimming. One commenter asked if the ratios include the lifeguards. The commenter expressed concern that this rule means that some families will not be allowed swimming or water activities without hiring staff or enlisting volunteers.

Response: DFPS is adopting this rule with changes based on the comments. DFPS is revising subsection (a) to be consistent with §749.2559 and §749.2563 by adding information regarding children five years old or older who are receiving treatment services. Also, a lifeguard can be counted in the child/adult ratio, and a clarification is made that the ratios do not include children over 12 who are proficient swimmers. To be consistent with current standards DFPS is also clarifying in subsection (c) that non-ambulatory children have a one to one ratio.

§749.3139. May I include volunteers or relatives who do not meet minimum qualification for caregivers in the swimming child/adult ratios?

Comment: One commenter asked that caregiver ratio be removed.

Response: DFPS is adopting this section without change. Young children and children who cannot swim require more supervision around water.

§749.3145. What are the safety requirements for wading pools?

Comment: DFPS received four comments. Three commenters asked that the word "sanitize" be deleted. One commenter stated that sanitizing a wading pool may be an issue for a setting like a day care center but shouldn't be necessary in a home setting and the little pool should be rinsed with clean water and left to air dry in the sun.

Response: DFPS is adopting this rule with a change based on the comments. DFPS is deleting the word "sanitize."

§749.3341. How often must I have contact with a child being considered for adoptive placement?

Comment: DFPS received two comments. One commenter asked that the rule clarify that the agency that has possession of the child is responsible for preparing the child for adoption. One commenter asked that contact requirements be left as in current standards due to cost factors.

Response: DFPS is adopting this rule without change. DFPS is not clear on what this commenter means by "possession of the child." The contact requirements are the same as the current minimum standards, so there should not be any additional costs.

§749.3343. What does preparing a child for adoption include?

Comment: One commenter was concerned about prescribing the use of a life book, as there are other methods for preparing a child.

Response: DFPS is adopting this rule with changes based on the comment.

§749.3345. Who must prepare a child for adoption?

Comment: One commenter stated that, in privatization, a goal is to limit the number of professional staff working with a child - it may be that the child's case manager is the most appropriate person to prepare that child for adoption. Suggest that the therapist can do this under the supervision of child placing or child placement management staff.

Response: DFPS is adopting this section without change. It is necessary that qualified staff oversee the preparation of the child for adoption. It does not preclude others who are important to the child from being included in the preparation activities.

§749.3371. What are the requirements for a child to visit the adoptive family prior to placement?

Comment: DFPS received six comments. One commenter strongly recommends that even an infant age 0-12 months have at least one visit in order to help the child bond with the new parent. One commenter asked that the rule clarify that the agency that has possession of the child is responsible for preparing the child for adoption.

Response: Based on the comment and because it is in current standards, DFPS is adopting this section with a change that requires preplacement visits except in the case of children one (instead of two) month old or younger. Licensing is not clear on what the last commenter means by "possession of the child."

§749.3395. What information must I provide the adoptive parents prior to or at the time of adoptive placement?

Comment: Two comments were received. One commenter stated that this standard does not allow for open adoption practice. Often times the birth parents and adoptive families are acquainted with each other and know identifying information. One commenter said that the rule should require adoptive parents to be informed about the federal adoption assistance program.

Response: DFPS is adopting this rule with changes based on the comments. The language has been clarified to allow more communication in situations like open adoptions, and the addition of the current minimum standard requirement to provide adoptive parents with information on adoption assistance. DFPS has also clarified an agency must discuss birth parent information with prospective adoptive parents.

§749.3425. What are the requirements for post-placement contacts with the adoptive family and child?

Comment: Three commenters recommended that §749.3425 and §749.3723 be made consistent.

Response: DFPS is adopting the rule with changes based on the comments. Section §749.3723 is being deleted and clarifications are made to match the current minimum standards.

§749.3461. Must I offer counseling services after the adoption is consummated?

Comment: Seven commenters asked if there is length of time that the agency has to pay for counseling services. The agency can't be financially responsible for providing these services indefinitely or throughout the child's lifetime. Adoptive parents are assuming these costs as part of their parental responsibilities at some point.

Response: Based on the comments, DFPS is adopting this rule with changes to make it more consistent with current minimum standards.

§749.3463. If supplemental information concerning birth parents subsequently comes to my attention, what are my responsibilities?

Comment: One commenter stated that the wording in subsection (a) exceeds the limits of the law.

Response: DFPS is adopting this rule with editorial changes. The legal requirement to supplement the Health, Social, Educational, and Genetic History Report is found in the Texas Family Code, §162.005(f). The rule is not saying to release confidential information.

§749.3465. What must I do when an adoptee requests his adoption record?

Comment: One commenter stated this standard does not permit identified adoptions. Often times the birth parents and adoptive families are acquainted with each other and know identifying information. To require agencies to edit information to protect the identity of the biological parents is not practical for open adoptions.

Response: DFPS is adopting this rule with changes based on the comments.

§749.3501. What information must I provide to birth parents who contact me for services?

Comment: DFPS received five comments. One commenter suggested several changes. Two commenters stated that the list is too detailed. An agency should be able to determine what is shared before there is a formal relationship established. This has practice and financial consequences that should be within the control of the agency. Two commenters stated that an adoption attorney advised that the language in paragraph (4) is not appropriate since Social Workers do not give legal advice. Requiring social workers to explain the legalities may be problematic. Social workers are not attorneys and should ensure that birth mothers have access to legal counsel to explain the intricacies of adoption law.

Response: DFPS is clarifying subsection (a) to change the words "prior to" to "upon," so information doesn't have to be provided until a formal relationship is established. No other changes are made based on the comments. This rule is taken from current minimum standards. Also, a lawyer can prepare the written information that is to be provided, and agencies may choose the appropriate person in the agency to provide and discuss this information, not explain it.

§749.3503. What are the requirements for contacting birth parents that become my clients?

Comment: DFPS received five comments. Three commenters stated that there are major objections from adoption agencies. This is a very costly requirement and will increase the cost to adoptive parents. Three commenters stated that we must keep in mind that more than one father is often named, alleged fathers are often at a long distance, in prison, military duty etc. Also, this does not take in to account the situation where a birth mother calls to relinquish from the hospital. Birth parents should be free from coercion but have the right to transact agreements and access services as they choose just as any other client. Two commenters asked to go back to original wording. The current regulation is better than the proposal. Also, because there may

be several potential fathers, this requirement should be limited to parents, not every sexual partner.

Response: DFPS is adopting this rule with changes based on the comments. Regarding the face-to-face contacts with the birth parents prior to the relinquishment, an exemption has been added, which states "if face-to-face contact with the birth father is not feasible, you must document justification for contacts that are not face-to-face." If the contacts cannot be made, an additional exemption states "you must document that you have exercised due diligence in your efforts to locate the absent parent." These changes should provide the flexibility needed to meet this requirement with minimal fiscal impact. The only change from current standards is that the face-to-face contacts must be made prior to the relinquishment, instead of prior to the placement. DFPS believes the benefit of these face-to-face contacts with the biological parents, far outweighs the fiscal impact.

§749.3523. What specific information must I obtain from birth parents that voluntarily relinquish their parental rights?

Comment: DFPS received three comments. The commenters asked that the agencies be allowed to use any form that meets the requirements in the Texas Family Code or to allow HSEGH to be used as the required history form, allow the information to be sent to the last known address of the parent or to the address requested by the parent, and require a medical history report as defined in the Texas Family Code.

Response: DFPS is legally required to develop, in conjunction with DSHS, and require the use of this form in the preparation of the Health, Social, Educational, and Genetic History Report. DFPS is adding information to this rule which clarifies this legal requirement.

§749.3573. What are the requirements to provide information about the child to birth parents after the adoption is consummated?

Comment: DFPS received two comments. The commenters said that there are times that birth parents have indicated their desire for a confidential adoption and stated that they do NOT want family members to know about the child's birth and adoption. To require that an agency violate the birth parent's expressed wishes creates ethical dilemmas. The suggestion was that subsection (a) be changed to "death due to genetic conditions or terminal illness" and subsection (c)(3) be removed because it is too prescriptive.

Response: DFPS is deleting the prescriptive requirements in subsection (c) in response to comments and to provide more flexibility in complying with this rule.

§749.3601. What information must I provide to persons inquiring about agency adoption services?

Comment: One commenter requested that the requirement to inform prospective adoptive families about the adoption assistance program be inserted back into the rules.

Response: DFPS is adopting this rule without change. The addition requested by the commenter is added to §749.3395.

§749.3623. What information must I obtain for the adoptive home screening?

Comment: One commenter suggested an editorial change.

Response: DFPS is adopting this rule with changes to be consistent with the requirements for a foster home screening. For the specific changes, see the response for §749.2447.

§749.3633. What must I do if I do not place a child with the adoptive applicants within six months after I complete the pre-adoptive home screening?

Comment: DFPS received three comments. Two commenters stated that they had been advised by adoption professionals that doing an update within six months is a much higher requirement than other states. The six-month requirement is difficult for international adoptions. This will be costly to parents adopting. One commenter recommended 9 to 12 months. This time frame is too short, particularly for international adoptions.

Response: DFPS is adopting this rule without change. Families can change drastically in a short period of time. It is necessary to ensure current information is available when matching children and families.

§749.3865. What must an individual plan for the assessment include?

Comment: One commenter recommended changing "assessment plan" to "plan for the assessment" since agencies may get confused between the assessment plan and the assessment report.

Response: DFPS is adopting this section with editorial changes based on the comment.

In addition to changes resulting from comments, DFPS is adopting the following rules with changes:

§749.65. What Children are eligible to participate in a transitional living program? An addition is made to clarify that children are generally eligible for transitional living at the age of 14 years old, but are only eligible for transitional living that involves decreased supervision at the age of 16 years old.

§749.67. What are the requirements for a transitional living program? DFPS is adding accessing community and other resources as a necessary component of a transitional living program.

§749.101. What are my responsibilities as the permit holder before I begin operating? The paragraphs that require documentation that must be submitted with an application for a license are moved to §745.243, which lists other information that must be submitted with an application for a license.

§749.105. What responsibilities do I have for personnel policies and procedures? DFPS is deleting a reporting requirement that is already addressed in a rule specific to serious incidents.

§749.133. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it? DFPS is revising from 15 days to 2 days the required time frame in this rule for notifying Licensing of a change in the composition of the governing body. The change makes this rule consistent with requirements in Chapter 745.

§749.163. What are my specific fiscal requirements? Based on comments from Chapter 748, DFPS is adopting this section with a change to allow the agency up to 30 days after discharge to give/send the child his money.

§749.359. What policies must I develop if I use volunteers? DFPS is adding that volunteer policies must address visitation with children in care, which is in current minimum standards.

§749.503. When must I report and document a serious incident? DFPS is adding required reporting of the removal of a child

by an unauthorized person and adding several requirements of §749.507 to this rule. This clarifies that the removal of a child by an unauthorized person qualifies as a missing child and consolidates all serious incident reporting requirements in the same rule.

§749.769. Can I use a volunteer that is on probation, parole, or referred for community service through the court? DFPS is editing this rule since the definition for "volunteer" has been changed to be narrower. The edits make the rule consistent with the intent of the originally published rule. Individuals on probation, parole, or referred for community service through the court may not provide volunteer services.

§749.1011. What right does a child have regarding contact with siblings? DFPS is making minor editorial changes so that the rule will be consistent with the changes to §749.503.

§749.1107. What must I document in the child's record at the time of admission? Based on comments from Chapter 748, DFPS is deleting the requirement to document the time of the child's admission, and adding a requirement to include known contraindications to the use of a restraint. DFPS is requiring the inclusion of information for persons with whom the child is allowed to leave the operation; names, addresses, and telephone numbers of biological or adoptive parents and siblings; and any chronic health conditions.

§749.1189. At the time of an emergency admission, what information must I document in the child's record at admission? DFPS is adding new paragraphs to be consistent with the requirements for non-emergency admissions, which require documentation of the date of the child's admission and documentation of any allergies and chronic health conditions. DFPS is also making editorial changes and adding a requirement to include known contraindications to the use of a restraint, based on a comment to §748.1537.

§749.1337. Are the participation, implementation, and documentation requirements for a service plan review and update the same as for an initial service plan? DFPS is revising the title of this rule because the notification requirements for a service plan review and update are the same as for an initial service plan.

§749.1377. What constitutes an emergency discharge or transfer? Based on comments from Chapter 748, DFPS is deleting the 10 day notice from the definition of an emergency discharge/transfer, and clarifying that an emergency discharge/transfer occurs when there is an immediate danger to the child AND *you determine you cannot serve the child*.

§749.1379. What must I document in the child's record at the time of an emergency discharge or transfer? DFPS is adding new paragraphs regarding documentation at the time of an emergency discharge or transfer, including the explanation given to the child regarding the reason for the discharge, and the child's reaction to the discharge.

§749.1413. Who must perform dental examinations and provide dental treatment? This rule is revised to be consistent with other rule changes related to health-care professionals.

§749.1425. What documentation is acceptable for an immunization record? This rule is revised to make it consistent with Chapter 748, including allowing a facsimile immunization record, and documentation by a registered nurse.

§749.1565. What must a caregiver do if the caregiver finds a medication label error? DFPS is revising to clarify when a medication label error has to be corrected.

§749.1809. Are mesh cribs or port-a-cribs allowed? Based on comments from Chapter 748, DFPS is adopting this section with changes to make the rule less prescriptive.

§749.1923. What physical fitness activities must caregivers provide for a child receiving treatment services for primary medical needs or mental retardation?

§749.1925. What type of daily schedule must caregivers provide for a child receiving treatment services for primary medical needs or mental retardation?

§749.1927. To what extent must a child receiving treatment services for primary medical needs or mental retardation have community living experiences? DFPS is clarifying that these rules apply to children receiving treatment services for primary medical needs or mental retardation.

§749.1961. May a person in care discipline or punish another person in care? DFPS is deleting the word punish from the rule and exempting babysitting as defined in §749.2559.

§749.2001. What do certain words mean in this subchapter? DFPS is deleting the definitions for "time out" and "quiet time" because there terms are not used in this subchapter, and revising the definition for "seclusion" to comply with the definition in Senate Bill 325, 79th Legislature, Regular Session.

§749.2053. Who may administer emergency behavior intervention? DFPS is deleting the age limit for short personal restraints.

§749.2055. What actions must a caregiver take before using a permitted type of emergency behavior intervention? DFPS is changing transitional hold to short personal restraint, which reflects the intended requirement for the rule.

§749.2205. What personal restraint techniques are prohibited? DFPS is deleting the requirement that the person monitoring a prone or supine restraint not be involved in the restraint. It was not intended for foster homes. DFPS is also making minor editorial changes.

§749.2555. How do I determine capacity? DFPS is clarifying that bathroom accommodations in the home must be considered in determining the home's capacity, and making minor editorial changes.

§749.2651. May a foster home accept adults into the home for care? DFPS is clarifying this rule and making it consistent with §749.1103 and §749.1105.

§749.2803. What changes affect the conditions of a foster home's verification? DFPS is revising so the rule is consistent with revisions to §749.2471(9), regarding what information must be included on a foster home verification certificate.

§749.2915. Where must a foster home store dangerous tools and equipment? DFPS is adopting with changes to allow use with proper supervision.

§749.3391. What information must I compile for a child I am considering for adoptive placement? DFPS is adding subsection (b) to specify documentation required for an adopted child's record that is currently required by DFPS rule.

§749.3621. What is a pre-adoptive home screening? DFPS is clarifying the information that child placement management staff must review and approve.

In addition, DFPS is making minor editorial changes to the following rules: §§749.513, 749.575, 749.867, 749.1101, 749.1137, 749.1333, 749.1671, 749.1807, 749.1951, 749.2303, 749.2337, 749.2623, 749.2625, 749.2627, 749.2635, 749.3021, 749.3323, 749.3629, 749.3801, 749.3831, 749.3861, 749.3869, 749.3871, and 749.3897.

SUBCHAPTER A. PURPOSE AND SCOPE

40 TAC §749.1, §749.3

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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Department of Family and Protective Services
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SUBCHAPTER B. DEFINITIONS AND SERVICES

DIVISION 1. DEFINITIONS

40 TAC §749.41, §749.43

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.43. What do certain words and terms mean in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. The following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) Accredited college or university--An institution of higher education accredited by one of the following:

(A) Southern Association of Colleges and Schools, Commission on Colleges;

(B) Middle States Association of Colleges and Schools, Commission on Higher Education;

(C) New England Association of Schools and Colleges, Commission on Institutions of Higher Education;

(D) North Central Association of Colleges and Schools, The Higher Learning Commission;

(E) Northwest Commission on Colleges and Universities;

(F) Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities; or

(G) Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges.

(2) Activity space--An area or room used for child activities.

(3) Adaptive functioning--Refers to how effectively a person copes with common life demands and how well the person meets standards of personal independence expected of someone in his particular age group, socio-cultural background, and community setting.

(4) Adoption record--All information received by the child-placing agency that bears the child's name or pertains to the child, including any information about the birth parents and adoptive parents, is considered to be part of the adoption record.

(5) Adult--A person 18 years old or older.

(6) Caregiver--A caregiver:

(A) Is a person counted in the child/caregiver ratio, including employees, foster parents, contract service providers, and volunteers, whose duties include direct care, supervision, guidance, and protection of a child in care. This includes any person that is solely responsible for a child. For example, a child-placement staff that takes a child on an appointment or doctor's visit is considered a caregiver.

(B) Does not include babysitters or respite child-care providers who are not:

(i) Verified foster parents;

(ii) Licensed foster parents; or

(iii) Agency employees.

(C) Does not include a contract service provider who:

(i) Provides a specific type of service to your agency for a limited number of hours per week or month; or

(ii) Works with one particular child.

(7) Child/caregiver ratio--The maximum number of children for whom one caregiver can be responsible.

(8) Child in care--A child or a young adult who has been placed by a child-placing agency in a foster or adoptive home, regardless of whether the child is temporarily away from the home, as in the case of a child at school or at work or receiving respite child-care services. Unless a child has been discharged from the child-placing agency, he is considered a child in care.

(9) Child passenger safety seat system--An infant or child passenger restraint system that meets the federal standards for crash-

tested restraint systems as set by the National Highway Traffic Safety Administration.

(10) Counseling--A procedure used by professionals from various disciplines in guiding individuals, families, groups, and communities by such activities as delineating alternatives, helping to articulate goals, processing feelings and options, and providing needed information. This definition does not include career counseling.

(11) Days--Calendar days, unless otherwise stated.

(12) De-escalation--Strategies used to defuse a volatile situation, to assist a child to regain behavioral control, and to avoid a physical restraint or other behavioral intervention.

(13) Department--The Department of Family and Protective Services (DFPS).

(14) Discipline--A form of guidance that is constructive or educational in nature and appropriate to the child's age, development, situation, and severity of the behavior.

(15) Disinfecting solution--A disinfecting solution may be:

(A) A self-made solution, prepared as follows:

(i) One tablespoon of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting such items as toys, eating utensils, and nonporous surfaces (such as tile, metal, and hard plastics); or

(ii) One-fourth cup of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting surfaces such as bathrooms, crib rails, diaper-changing tables, and porous surfaces, such as wood, rubber or soft plastics; or

(B) A commercial product that meets the Environmental Protection Agency's (EPA's) standards for "hospital grade" germicides (solutions that kill germs) that you must use according to label directions.

(16) Emergency Behavior Intervention--Interventions used in an emergency situation, including personal restraints, mechanical restraints, emergency medication, and seclusion.

(17) Family applicants--All residents, part- or full-time, of a household that are being considered for verification as an agency foster home or approved as an adoptive home.

(18) Family members--An individual related to another individual within the third degree of consanguinity or affinity. For the definitions of consanguinity and affinity, see Chapter 745 of this title (relating to Licensing). The degree of the relationship is computed as described in Government Code, §573.023 (relating to Computation of Degree of Consanguinity) and §573.025 (relating to Computation of Degree of Affinity).

(19) Food service--The preparation or serving of meals or snacks.

(20) Foster family home--A home that is the primary residence of the foster parent(s) and provides care for six or fewer children or young adults, under the regulation of a child-placing agency.

(21) Foster group home--An operation verified:

(A) After January 1, 2007, that is the primary residence of the foster parent(s) and provides care for seven to 12 children or young adults, under the regulation of a child-placing agency; or

(B) Prior to January 1, 2007, that provides care for seven to 12 children or young adults, under the regulation of a child-placing agency.

(22) Foster home--As referred to in this chapter means both types of homes, foster family homes and foster group homes.

(23) Foster home screening--A written evaluation, prior to the placement of a child in a foster home, of the:

(A) Prospective foster parent(s);

(B) Family of the prospective foster parent(s); and

(C) Environment of the foster parent(s) and their family in relation to their ability to meet the child's needs.

(24) Foster parent--A person who provides foster care services in the foster home.

(25) Full-time--At least 30 hours per week.

(26) Garbage--Food or items that when deteriorating cause offensive odors and/or attract rodents, insects, and other pests.

(27) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

(28) Human services field--A field of study that contains coursework in the social sciences of psychology and social work including some counseling classes focusing on normal and abnormal human development and interpersonal relationship skills from an accredited college or university. Coursework in guidance counseling does not apply.

(29) Immediate danger--A situation where a prudent person would conclude that bodily harm would occur if there were no immediate interventions. Immediate danger includes a serious risk of suicide, serious physical injury, or the probability of bodily harm resulting from a child running away if under 10 years old chronologically or developmentally. Immediate danger does not include:

(A) Harm that might occur over time or at a later time; or

(B) Verbal threats or verbal attacks.

(30) Infant--A child from birth through 17 months.

(31) Livestock--An animal raised for human consumption or an equine animal.

(32) Living quarters--A structure or part of a structure where a group of children reside, such as a building, house, cottage, or unit.

(33) Long-term placement--A placement intended to last for more than 90 days.

(34) Master record--The compilation of all required records for a specific person or home, such as a master personnel record, master case record for a child, or a master case record for a foster or adoptive home.

(35) Non-ambulatory--A child that is only able to move from place to place with assistance, such as a walker, crutches, a wheelchair, or prosthetic leg.

(36) Non-mobile--A child that is not able to move from place to place, even with assistance.

(37) Person legally authorized to give consent--The person legally authorized to give consent by the Texas Family Code or a person authorized by the court.

(38) Physical force--Pressure applied to a child's body that reduces or eliminates the child's ability to move freely.

(39) Post-adoptive services--Services available through the child-placing agency (direct or on referral) to birth and adoptive parents and the adoptive child after the adoption is consummated. Examples include counseling, maintaining a registry if a central registry is not used, providing pertinent, new medical information to birth or adoptive parents, or providing the adult adoptee a copy of his record upon request.

(40) Post-placement report--A written evaluation of the assessments and interviews, after the adoptive placement of the child, regarding the:

(A) Child;

(B) Prospective adoptive parent(s);

(C) Family of the prospective adoptive parent(s);

(D) Environment of the prospective adoptive parent(s) and their family; and

(E) Adjustment of all individuals to the placement.

(41) Pre-adoptive home screening--A written evaluation, prior to the placement of a child in an adoptive home, of the:

(A) Prospective adoptive parent(s);

(B) Family of the prospective adoptive parents; and

(C) Environment of the adoptive parents and their family in relation to their ability to meet the needs of a child, and if a child has been identified for adoption, the needs of that particular child.

(42) PRN--A standard order or prescription that applies "pro re nata" or "as needed according to circumstances."

(43) Professional service provider--Refers to:

(A) A child placement management staff or person qualified to assist in child placing activity;

(B) A psychiatrist licensed by the Texas State Board of Medical Examiners;

(C) A psychologist licensed by the Texas State Board of Examiners of Psychologists;

(D) A master's level social worker or higher licensed by the Texas State Board of Social Work Examiners;

(E) A professional counselor licensed by the Texas State Board of Examiners of Professional Counselors;

(F) A marriage and family therapist licensed by the Texas State Board of Examiners of Marriage and Family Therapists; and

(G) Other professional employees in fields such as drug counseling, nursing, special education, vocational counseling, pastoral counseling, and education who may be included in the professional staffing plan for your agency that provides treatment services if the professional's responsibilities are appropriate to the scope of the agency's program description. These professionals must have the minimum qualifications generally recognized in the professional's area of specialization.

(44) Re-evaluation--Includes an assessment of all factors required for the initial evaluation only for the purpose of determining if any substantive changes have occurred. If substantive changes have occurred, these areas must be fully evaluated.

(45) Regularly--On a recurring, scheduled basis.

(46) Sanitize--A four-step process that must be followed in the subsequent order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least 10 minutes. Rinsing with cool water only those items that a child is likely to place in his mouth; and

(D) Allowing the surface or article to air-dry.

(47) School-age child--A child who is five years old or older and who will attend school in August or September of that year.

(48) Seat belt--A lap belt and any shoulder strap included as original equipment on or added to a motor vehicle.

(49) Service plan--A plan that identifies a child's basic and specific needs and how those needs will be met.

(50) State or local fire inspector--A fire official designated by the city, county, or state government.

(51) State or local sanitation official--A sanitation official designated by the city, county, or state government that is trained in sanitary science to perform duties relating to education and inspections in environmental sanitation.

(52) Substantial bodily harm--Physical injury serious enough that a prudent person would conclude that the injury required professional medical attention. It does not include minor bruising, the risk of minor bruising, or similar forms of minor bodily harm that will resolve healthily without professional medical attention.

(53) Toddler--A child from 18 months through 35 months old.

(54) Treatment director--The person responsible for the overall treatment program providing treatment services. A treatment director may have other responsibilities and may designate treatment director responsibilities to other qualified persons.

(55) Universal precautions--An approach to infection control where all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(56) Volunteer--A person who provides services:

(A) Child-care services, treatment services, or programmatic services under the auspices of the agency without monetary compensation, including a "sponsoring family;" or

(B) Any type of services under the auspices of the agency without monetary compensation when the person has unsupervised access to a child in care.

(57) Water activities--Activities related to the use of splashing pools, wading pools, swimming pools, or other bodies of water.

(58) Young adult--An adult whose chronological age is between 18 and 22 years, who is currently in a residential child-care agency, and who continues to need child-care services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 23, 2006.

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DIVISION 2. SERVICES

40 TAC §§749.61, 749.63, 749.65, 749.67, 749.69, 749.71

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.61. What types of services does Licensing regulate?
We regulate the following types of services:

(1) Child-Care Services--Services that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning;

(2) Treatment Services--In addition to child-care services, a specialized type of child-care services designed to treat and/or support children with:

(A) Emotional Disorders, such as mood disorders, psychotic disorders, or dissociative disorders, and who demonstrate three or more of the following:

(i) A Global Assessment Functioning of 50 or below;

(ii) A current DSM diagnosis;

(iii) Major self-injurious actions, including recent suicide attempts;

(iv) Difficulties that present a significant risk of harm to self or others, including frequent or unpredictable physical aggression; or

(v) A primary diagnosis of substance abuse or dependency and severe impairment because of the substance abuse;

(B) Mental Retardation, who have an intellectual functioning of 70 or below and are characterized by prominent, significant deficits and pervasive impairment in one or more of the following areas:

(i) Conceptual, social, and practical adaptive skills to include daily living and self care;

(ii) Communication, cognition, or expressions of affect;

(iii) Self-care activities or participation in social activities;

(iv) Responding appropriately to an emergency; or

(v) Multiple physical disabilities, including sensory impairments;

(C) Pervasive Developmental Disorder, which is a category of disorders (e.g. Autistic Disorder or Rett's Disorder) characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas of development:

(i) Conceptual, social, and practical adaptive skills to include daily living and self care;

(ii) Communication, cognition, or expressions of affect;

(iii) Self-care activities or participation in social activities;

(iv) Responding appropriately to an emergency; and

(v) Multiple physical disabilities including sensory impairments; or

(D) Primary Medical Needs, who cannot live without mechanical supports or the services of others because of non-temporary, life-threatening conditions, including the:

(i) Inability to maintain an open airway without assistance. This does not include the use of inhalers for asthma;

(ii) Inability to be fed except through a feeding tube, gastric tube, or a parenteral route;

(iii) Use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross-infection or contamination, or prevent tissue breakdown; or

(iv) Multiple physical disabilities including sensory impairments; and

(3) Additional Programmatic Services, which include:

(A) Transitional Living Program--A residential services program designed to serve children 14 years old or older for whom the service or treatment goal is basic life skills development toward independent living. A transitional living program includes basic life skills training and the opportunity for children to practice those skills. A transitional living program is not an independent living program;

(B) Assessment Services Program--Services to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facilitate service planning; and

(C) Respite Child-Care Services--See §749.2621 of this title (relating to What are respite child-care services?).

§749.65. What children are eligible to participate in a transitional living program?

(a) For a child to be eligible to participate in a transitional living program, the child must be 14 years old or older.

(b) For a child to be eligible to receive the level of caregiver supervision described in §749.2597 of this title (relating to Where must the caregivers reside in order to supervise children who are in a transitional living program?), the child must be 16 years old or older.

§749.67. What are the requirements for a transitional living program?
A transitional living program must have a training program for children that demonstrates competency in the following areas:

(1) Health, general safety, and fire safety practices;

(2) Money management;

(3) Transportation skills;

(4) Accessing community and other resources; and

(5) Child health and safety, child development, and parenting skills, if the child is a parent of a child living with him.

§749.71. May I have an independent living program?
Your agency may not provide an independent living program for a child in care under 18 years old.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION
DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §§749.101, 749.103, 749.105, 749.107

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.101. What are my responsibilities as the permit holder before I begin operating?
Before you begin operating, you are responsible for:

(1) Ensuring that your agency is legally established to operate within Texas and complying with all applicable statutes;

(2) Establishing the governing body of the agency;

(3) Having a governing body that is responsible for, and has authority over, the agency's policies and activities;

(4) Having policies that clearly state the responsibilities of the governing body;

(5) Developing operational policies and procedures that comply with or exceed the rules specified in this chapter, Chapter 42 of the Human Resources Code, Chapter 745 of this title (relating to Licensing), and other applicable laws;

(6) Developing and providing us your plan for ensuring that:

(A) We are informed of any changes in:

(i) The location of all agency records, offices and agency homes;

(ii) Agency home verification; and

(iii) Your written professional staffing plan;

(B) Agency homes meet all applicable rules of this chapter prior to verification;

(C) Upon our request, you investigate reports of rules violations in a timely manner and submit reports of your agency's actions and findings to us for our review, follow-up, and closure;

(D) Your child placement management staff conduct or review and sign off on all investigations completed by your agency;

(E) Your child placement management staff submits an investigation report to your agency's Licensing representative within 30 days of the request from Licensing; and

(F) You evaluate the effectiveness of your system for meeting rules of this chapter and describe the process your agency will use to address problems that your evaluation system identifies.

§749.103. What are my operational responsibilities as the permit holder?

When you begin operating, you must:

(1) Designate a full-time child-placing agency administrator who meets minimum qualifications of §749.631 of this title (relating to What qualifications must a child-placing agency administrator meet?);

(2) Operate according to the written policies and procedures adopted by the governing body;

(3) Maintain current, accurate, and complete master records;

(4) Ensure that all required documentation is true, current, accurate, and complete;

(5) Allow us to inspect your child-placing agency during its hours of operation;

(6) Allow us to inspect or monitor one of your foster homes at any time;

(7) Conduct ongoing evaluations of verified foster homes, including documentation of unmet rules of this chapter and correction of all deficiencies;

(8) Display your permit at your agency and a copy at any branch office;

(9) Observe the conditions of your permit;

(10) Not offer unrelated types of services that conflict or interfere with the best interests of a child in care, a caregiver's responsibilities, or space in the homes. If you offer more than one type of service, you must determine and document that no conflict exists;

(11) Maintain liability insurance as required by the Human Resources Code, §42.049;

(12) Comply with Chapters 42 and 43 of the Human Resources Code and all other applicable laws and rules of the Texas Administrative Code;

(13) Not act as an agent for unlicensed agencies, institutions, or individuals;

(14) Prior to implementing any changes, inform us of any changes to the plan you developed under §749.101 of this title (relating to What are my responsibilities as the permit holder before I begin operating?);

(15) Prepare the annual budget and control expenditures to ensure needs of the children are met; and

(16) Ensure that no member of the governing body, member of the executive committee, management staff, or employee is listed as a sustained controlling person.

§749.105. What responsibilities do I have for personnel policies and procedures?

You must:

(1) Develop a written organizational chart showing the administrative, professional, and staffing structures and lines of authority;

(2) Develop written job descriptions, including minimum qualifications and job responsibilities for each position;

(3) Develop written policies on the training requirements for employees and caregivers;

(4) Ensure that personnel policies comply with personnel requirements outlined in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(5) Ensure your employees report serious incidents and suspected abuse, neglect, or exploitation as required by the Family Code, §261.401;

(6) Ensure that all employees and consulting, contracting, and volunteer professionals who work with a child and others with access to information about a child are informed in writing of their responsibility to maintain child confidentiality; and

(7) Either adopt the model drug testing policy or have a written drug testing policy that meets or exceeds the criteria in the model policy provided in §745.4151 of this title (relating to What drug testing policy must my residential child-care operation have?).

§749.107. What must my conflict of interest policies include?

Your conflict of interest policies must include a:

(1) Code of conduct on the relationship between employees, contract service providers, children in placement, foster and adoptive parents, and children's families;

(2) Statement that it is a conflict of interest for any of the following people or relatives of any of the following to be verified as a foster parent or approved as an adoptive parent of the agency: any current owner, member of the governing body, executive director, or any other employee or contract service provider of your agency; and

(3) Code of conduct on the relationship between your agency's owners, members of the governing body, employees, and prospective and current foster and adoptive parents, including required parameters for entering into independent financial relationships or transactions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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DIVISION 2. GOVERNING BODY

40 TAC §749.131, §749.133

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.131. What are the specific responsibilities of the governing body?

The governing body is responsible for:

(1) Ensuring the agency remains fiscally sound;

(2) Overseeing and ensuring the management of the agency's services and programs in compliance with your policies;

(3) Approving and having authority over the agency's operational policies and activities which must comply with rules of this chapter;

(4) Complying with the law, including Chapters 42 and 43 of the Human Resources Code, the applicable rules of this chapter, and other applicable rules in the Texas Administrative Code;

(5) Ensuring that persons employed by or working at the agency, any family members of the owner or governing body members, paid consultants, or others who benefit financially from the agency, such as subcontractors or vendors, do not comprise a majority of the voting members of the governing body:

(A) Agencies that are granted a permit by us before January 1, 2007, have two years to comply with this paragraph; and

(B) Agencies that are granted a permit by us after January 1, 2007, have two years from the date the agency is licensed by us to comply with this paragraph; and

(6) Carrying out governing body responsibilities assigned in the agency's policies and procedures.

§749.133. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it?

You must provide to us in writing any change in:

Figure: 40 TAC §749.133

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. GENERAL FISCAL REQUIREMENTS

40 TAC §§749.161, 749.163, 749.165

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.163. What are my specific fiscal requirements?

You must:

(1) Submit documentation to us of a 12-month budget of income and expenses with the application for a new permit;

(2) Submit documentation to us of reserve funds or available credit at least equal to operating costs for the first three months of operation with the application for a new permit;

(3) Have predictable funds sufficient for the first year of operation;

(4) Demonstrate at all times that you have or will have sufficient funds to provide appropriate services for all children in your care; and

(5) Account for a child's money separately from the funds of your agency and the foster home. No child's personal earnings, allowances, or gifts may be used to pay for the child's room and board, unless such a use is a part of the child's service plan and the child's parent approves it in writing. You must give or send the child's money to the child, parent, or next placement within 30 days of the child's discharge.

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DIVISION 4. FISCAL REQUIREMENTS FOR ADOPTION AGENCIES

40 TAC §§749.191, 749.193, 749.195, 749.197, 749.199

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.195. What types of fees may I collect prior to the completion and approval of a home study?

You may only accept reasonable application fees, home study fees, and fees for education and training of the prospective adoptive parents prior to the completion of the home study.

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DIVISION 5. FINANCIAL ASSISTANCE TO BIRTH MOTHERS

40 TAC §§749.231, 749.233, 749.235, 749.237, 749.239, 749.241, 749.243, 749.245

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.231. What financial assistance may I provide for a birth mother?

(a) You may provide financial assistance to a birth mother to meet her reasonable and necessary living expenses and legal costs.

(b) Reasonable and necessary living expenses include:

(1) Housing expenses;

(2) Necessary utilities, such as electric, water, or telephone bills;

(3) Food for the birth mother and her minor children that are living with her;

(4) Travel expenses for transportation necessary to support the pregnancy, such as gasoline or bus fares to medical appointments or the grocery store;

(5) Medical costs; and

(6) Child-care or foster care while a birth mother is hospitalized or unable to care for her children.

(c) Reasonable and necessary living expenses do not include:

(1) Any expenses met by a birth mother's existing resources;

(2) Any expenses supporting other family members, with the exception of the birth mother's minor children who are living with her;

(3) Any expenses for recreational and leisure activities; or

(4) The purchase of an automobile.

§749.237. How do I document financial assistance that I provide for a birth mother?

(a) You must document financial assistance that you provide for the birth mother through receipts.

(b) A receipt must include the date, payee identification, purpose of payment, and documentation that the funds were expended for services rendered or goods provided for the birth mother.

(c) You must organize and maintain this documentation in the individual record of the birth mother.

§749.239. May I provide cash payments to birth mothers?

(a) For reasonable and necessary living expenses, you may provide cash payments to birth mothers to cover the cost of day-to-day routine purchases, such as food, household supplies, personal hygiene or grooming items, and gasoline or public transportation if your policies:

(1) State when and for what purpose you can make cash payments to a birth mother;

(2) Establish a maximum amount per category, per time period, based on the current rates in the community in which the care is provided; and

(3) Require you to obtain documentation from a birth mother acknowledging receipt of the payments.

(b) Each cash disbursement may cover a period of up to one month.

§749.241. If a birth mother decides not to relinquish a child for adoption, may I require her to repay my agency or the adoptive parent for expenses and services incurred?

(a) No, you may not require a birth mother to repay you for expenses and/or services incurred.

(b) You must inform a birth mother of this policy in writing upon establishing any formal relationship between your agency and a birth mother and post it in the agency's offices in a place routinely visible to birth mothers. The written policy provided to the birth mother must be in a language spoken and read by the birth mother.

§749.245. If a birth mother's needs are met through existing resources, can I disrupt that arrangement?

(a) If a birth mother's needs are met through an existing resource, you must not, by action or advice, disrupt that unless your child placement management staff determines that it is in the best interest of the birth mother and her child that other arrangements be made based on documented proof that her current living situation impacts the basic health or safety of the birth parent or the child, including psychological or emotional abuse. For example, if family members are providing housing at no cost to a birth mother, your agency may not advise the birth mother to move to an apartment for which your agency would pay rent.

(b) This rule applies to any kind of financial assistance.

(c) You must document the impact and determination of best interest before any arrangements are made and/or expenses are paid.

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DIVISION 6. FISCAL ACCOUNTABILITY/PASS-THROUGH EXPENSES

40 TAC §749.271, §749.273

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 7. BRANCH OFFICES

40 TAC §749.301, §749.303

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.303. What must I do before opening a branch office?

At least 30 days prior to the opening of a branch office, you must provide us the following information with your request to amend your license:

(1) The address, telephone numbers (if available), and office hours for the branch office;

(2) The name, qualifications, and contact information of the administrative staff person who will be primarily responsible for the day-to-day operation of the branch office;

(3) The name(s), qualifications, and contact information of the child placement management staff that will be responsible for child-placing activities of the branch office;

(4) The name(s) and qualifications of other employees who will be involved in child-placing activities at the branch office; and

(5) A written plan describing how child placement staff will supervise child-placement activities provided from the branch office. The plan must describe:

(A) Who will be responsible for the on-going supervision and support to the employees;

(B) How often there will be in-person contact and supervision of the employees;

(C) Who will be responsible for providing support in case of emergencies or placement crises; and

(D) How employees will be provided with reasonable access to their supervisor(s).

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DIVISION 8. POLICIES AND PROCEDURES

40 TAC §§749.331, 749.333, 749.335, 749.337, 749.339, 749.341, 749.343, 749.345, 749.347, 749.349, 749.351, 749.353, 749.355, 749.357, 749.359

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.331. What are the general requirements for my agency's policies?

(a) The requirements for policies only apply to the agency's policies that are required or governed by this chapter.

(b) The policies that we require must be written and they must indicate the approval of the governing body, date of approval, and effective date.

(c) The policies must be clearly stated and comply with the rules of this chapter.

(d) All employees and caregivers must be made aware of and follow your policies and procedures. A copy of your policies and procedures must be maintained at the agency and available for review by an employee or caregiver.

(e) All policies must be available for review by our staff and your clients, upon request.

(f) You must report any significant change to the policies to us at least seven days before implementing the change.

(g) You must maintain copies of all current and previous policies for at least two years.

§749.337. What policies must I provide to the person placing the child?

(a) You must give copies of the following policies to the person legally authorized to place the child:

(1) Fee policies;

(2) Emergency behavior intervention policies;

(3) Discipline policies;

(4) Treatment services policies, if the child is receiving treatment; and

(5) Adoption policies, if applicable.

(b) Upon request you must make available to the person legally authorized to place the child any other policies that are required by us.

(c) The policies listed in subsection (a) of this section must also be made available to employees, contract staff, foster parents, and adoptive parents.

§749.339. What child-care policies must I develop?

You must develop policies that describe:

(1) Visitation rights between the child and family members and the child and friends;

(2) The child's rights to correspond by mail with family members and friends, including any policies regarding mail restrictions and receipt of electronic mail;

(3) The child's rights to correspond by telephone with family members and friends;

(4) The child's rights to receive and give gifts to family, friends, staff or caregivers, or other children in care, including any restrictions on gifts;

(5) Personal possessions a child is or is not allowed to have;

(6) Emergency behavior intervention techniques if the use of emergency behavior intervention is permitted in your agency. If its use is not permitted, you must have a policy disallowing its use;

(7) Discipline policies including techniques and methods for ensuring the appropriateness of discipline techniques used with a child. These policies and procedures must:

(A) Guide employees and caregivers in methods used for discipline of a child in care;

(B) Include measures for positive responses to appropriate behavior;

(C) Make clear that discipline of any type is inappropriate and not permitted for infants; and

(D) Emphasize the importance of nurturing behavior, stimulation, and promptly meeting the child's needs;

(8) Any religious program or activity that you offer, including whether children are required to participate in religious activities with caregivers or staff;

(9) The plans for meeting the educational needs of each child;

(10) When trips with caregivers away from the home are allowed and what protocols will be used;

(11) Program expectations and rules that apply to all children;

(12) Child grievance procedures;

(13) The types and frequency of reports to parents;

(14) Procedures for routine and emergency diagnosis and treatment of medical and dental problems;

(15) Routine health care relating to pregnancy and childbirth, if you admit and/or care for a pregnant child;

(16) Your plan for providing health-care services to a child with primary medical needs;

(17) Transitional living policies, if applicable; and

(18) If applicable, the policy required by §749.2961(a)(2) of this title (relating to Are weapons, firearms, explosive materials, and projectiles permitted in a foster home?).

§749.341. What emergency behavior intervention policies must I develop if the use of emergency behavior intervention is permitted in my foster homes?

At a minimum, you must develop emergency behavior intervention policies to implement the requirements in Subchapter L of this chapter (relating to Foster Care Services: Emergency Behavior Intervention). The policies must include the following:

(1) A complete description of emergency behavior interventions that you permit caregivers to use;

(2) The specific techniques that caregivers can use;

(3) The qualifications for caregivers who assume the responsibility for emergency behavior intervention implementation, including required experience and training, and an evaluation component for determining when a specific caregiver meets the requirements of a caregiver qualified in emergency behavior intervention. You must have an on-going program to evaluate caregivers qualified in emergency behavior intervention and the use of emergency behavior interventions;

(4) Your requirements for and restrictions on the use of permitted emergency behavior interventions;

(5) How you will meet the following requirements:

(A) During admission, explain and document the following to a child in a manner that the child can understand:

(i) Who can use an emergency behavior intervention;

(ii) The actions a caregiver must first attempt to defuse the situation and avoid the use of emergency behavior intervention;

(iii) The situations in which emergency behavior intervention may be used;

(iv) The types of emergency behavior intervention you authorize;

(v) When the use of an emergency behavior intervention must cease;

(vi) What action the child must exhibit to be released from the emergency behavior intervention;

(vii) The way to report an inappropriate emergency behavior intervention;

(viii) The way to provide voluntary comments on any emergency behavior intervention; and

(ix) The process for making comments on any emergency behavior intervention, such as comments regarding the incident that led to the emergency behavior intervention, the manner in which a caregiver intervened, and the manner in which the child was the subject or to which they were a witness. You may create a standardized form that is easily accessible or give children the permission to submit comments on regular paper; and

(B) At admission, requirements for obtaining each child's input on preferred de-escalation techniques that caregivers can use to assist the child in the de-escalation process, and revisiting this information with the child and caregivers during each post emergency behavior intervention discussion;

(6) Requirement that caregivers must attempt less restrictive and less intrusive emergency behavior interventions as preventive measures and de-escalating interventions to avoid the need for the use of emergency behavior intervention;

(7) Training for emergency behavior intervention. The policy must include a description of the emergency behavior intervention training curriculum that meets the requirements in the rules of this chapter, the amount and type of training required for different levels of caregivers (if applicable), training content, and how the training will be delivered; and

(8) Prohibitions for discharging or otherwise retaliating against:

(A) An employee, client, resident, or other person for filing a complaint, presenting a grievance, or otherwise providing in good faith information relating to the misuse of emergency behavior intervention at the agency or foster home; or

(B) A client or resident because someone on behalf of the client or resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of emergency behavior intervention at the agency or foster home.

§749.343. What policies must I develop on the discipline of children in foster care and pre-adoptive care?

You must develop policies that guide caregivers in methods used for discipline of children in foster care or adoptive placement prior to consummation, and include:

(1) Measures for positive responses to appropriate behavior;

(2) If you work with infants, a statement that discipline of any type is not appropriate or permitted for infants; and

(3) The importance of nurturing behavior, stimulation, and promptly meeting the child's needs.

§749.347. What policies must I develop on the rights and responsibilities of the agency, foster parents, and caregivers?

You must develop a statement of the rights and responsibilities of the agency and foster parents that address the relationship between the agency and the foster parents and must specify:

(1) What decisions you will make, what decisions the foster parents will make, and which ones you and the foster parents must agree upon;

(2) Training requirements for foster parents and caregivers, including:

(A) What part you will provide;

(B) What part the foster parents and caregivers must acquire on their own; and

(C) A statement about who will be responsible for training fees, travel expenses, and associated child-care costs;

(3) The channels through which you and the foster parents will communicate with each other;

(4) The amount of reimbursement(s) you will provide the foster parents and when the foster parents will receive it;

(5) The kind and amount of information and pre-placement contact you will provide, so the foster parents can make an informed decision about a placement;

(6) How much discretion the foster parents have in accepting or declining specific placements;

(7) The kind and amount of support provided to all foster families and any services available to foster parents, including respite child-care, homemaker services, or counseling;

(8) The kind and amount of information about a child (including previous placements) that you will give to foster parents when placing or considering placing the child;

(9) The kind of information you expect the foster parents to report to you and within what time frames;

(10) The foster parents' role in the services to children in care, including expectations for the foster parents' participation in service planning and implementation; and

(11) The foster parents' right to appeal your actions and decisions that affect them and the procedures for making an appeal.

§749.349. What additional policies must I develop for foster parents that provide treatment services?

You must develop additional policies for foster parents that provide treatment services. These policies must include:

(1) Ongoing assessments of the caregiver's abilities to meet the needs of the children in care;

(2) Safeguards for protecting the children and caregivers;

(3) Emergency back-up and support systems for the caregivers; and

(4) A procedure for your review and approval of paragraphs (1) - (3) of this section.

§749.353. What policies must I develop for babysitters and respite child-care providers in foster homes?

You must develop policies for babysitters and respite child-care providers in foster homes that include:

(1) Minimum age for care providers;

(2) Minimum amount and type of prior child-care experience that a provider must have;

(3) Amount and type of training a provider must have;

(4) Reference and background information that foster parents must obtain before using the provider;

(5) Amount of time a provider can care for children;

(6) Number of children that a provider can care for;

(7) Information that the foster parents must share with a provider, including information about the children in care and emergency contact information for the foster parent and the agency;

(8) Specific care instructions that the foster parents must share with a provider for children with treatment needs;

(9) A method for contact between the foster parent and provider during the time of the provider's care;

(10) Procedures for agency review and approval of arrangements; and

(11) Requirements for documentation of arrangements, including agency child placement staff review and approval, in the foster home record.

§749.359. What policies must I develop if I use volunteers?

If you use volunteers, you must develop policies that:

(1) Include volunteer job descriptions and/or responsibilities;

(2) Address volunteer qualifications, screening and selection procedures, and orientation and training programs;

(3) Address supervision of volunteers; and

(4) Address visitation with children in care.

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DIVISION 9. CLIENTS AND APPEALS

40 TAC §§749.421, 749.423, 749.425

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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SUBCHAPTER D. REPORTS AND RECORD KEEPING

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

40 TAC §§749.501, 749.503, 749.505, 749.507, 749.509, 749.511, 749.513, 749.515

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.503. When must I report and document a serious incident?

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified time frames:
Figure: 40 TAC §749.503(a)

(b) If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident. You do have to report the incident to law enforcement, as outlined in the chart above. You also have to report the incident to the parents, if the adult resident is not capable of making decisions about his own care.

(c) You must report and document the following types of serious incidents involving your agency, one of your foster homes, an employee, contract staff, or a volunteer to the following entities within the specified time frame:
Figure: 40 TAC §749.503(c)

§749.507. When must I report other occurrences?
You must report and document the following occurrences to the following entities within the specified time frame:
Figure: 40 TAC §749.507

§749.509. How do I make a report of a serious incident or occurrence to Licensing?

(a) All serious incident reports must be made to the Child Abuse Hotline.

(b) Occurrences that are required to be reported to Licensing in writing must be forwarded to your Licensing representative (See §749.507(2) and (3) of this title (relating to When must I report other occurrences?)).

§749.513. What additional documentation must I include with a written serious incident report?
You must include the following additional documentation with a written serious incident report, as applicable:
Figure: 40 TAC §749.513

§749.515. Where must I keep incident reports?

(a) You must keep a copy of the incident report on file for two years.

(b) You must permit Licensing to make a copy of incident reports, as requested.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. OPERATION RECORDS

40 TAC §§749.531, 749.533, 749.535, 749.537

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which

provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.535. How current must a record be?

(a) All documentation must be in the record:

(1) No later than 30 days after the occurrence or event;

(2) Within 15 days from the end of the month for monthly summaries; or

(3) As otherwise specified in this chapter.

(b) Copies of any records kept by the foster parents must be submitted to you each month. You must file these records in the child's record.

§749.537. Must I make records available for Licensing to review?

(a) You must make all active records available for our immediate review and reproduction.

(b) You must make all archived records available for our review and reproduction within 48 hours.

(c) We must have reasonable access to your storage and file areas in order to monitor your record keeping.

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DIVISION 3. PERSONNEL RECORDS

40 TAC §§749.551, 749.553, 749.555

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.553. What information must the personnel record of an employee include?

For each employee, excluding foster parents, the personnel record must include:

(1) Documentation showing the date of employment;

(2) Documentation showing how the person meets the minimum age and qualifications for the position;

(3) A current job description;

(4) Evidence of any valid professional licensures, certifications, or registrations the person must have to meet qualifications for the job position, such as a current renewal card or a letter from the credentialing entity verifying that the person has met the required renewal criteria;

(5) A copy of the record of tuberculosis screening conducted prior to the person having contact with children in care showing that the employee is free of contagious tuberculosis as provided in §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?);

(6) A notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059;

(7) A statement signed and dated by the employee that he has read a copy of the:

(A) Operational policies; and

(B) Personnel policies;

(8) A statement signed and dated by the employee indicating that he must immediately report any suspected incident of child abuse, neglect, or exploitation to the Child Abuse Hotline and the agency's administrator or administrator's designee;

(9) Proof of request for background checks;

(10) A copy of the valid driver's license for each person who transports a child;

(11) A record of training and training hours;

(12) Any documentation of the person's tenure with the agency; and

(13) The date and reason for the person's separation from the agency, if applicable.

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DIVISION 4. CLIENT RECORDS

40 TAC §§749.571, 749.573, 749.575, 749.577, 749.579, 749.581, 749.583, 749.585, 749.587

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which

provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.575. What is an active record for a child?
An active child record consists of the child's record for the most recent 12 months of service.

§749.577. What information must an active child record include?
For each child, the active record must include:

(1) The child's full name and another method of identifying the child, such as a client number;

(2) Documentation of known allergies and chronic conditions on the exterior of the child's record or in another location where the information is clearly visible to persons with access to the record; and

(3) The date of each data entry and the name of the person who makes the data entry.

§749.583. Who must consent to the release of a child's record?
Unless you are releasing information to a parent, to us, or as required by law, you may not release any portion of a child's record to any agency, organization, or individual without the written consent of the person legally authorized to consent to the release.

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SUBCHAPTER E. AGENCY STAFF AND CAREGIVERS

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §§749.601, 749.603, 749.605, 749.607, 749.609

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.601. What must my written professional staffing plan include?

Your written and implemented professional staffing plan must:

(1) Demonstrate that the number, qualifications, and responsibilities of professional staff, including the child-placing agency administrator, are appropriate for the size and scope of your services and that workloads are reasonable enough to meet the needs of the children in care;

(2) Describe in detail the qualifications, duties, responsibilities, and authority of professional positions. For each position, the plan must show whether employment is on a full-time, part-time, or continuing consultative basis. For part-time and consulting positions, the plan must specify the number of hours and/or frequency of services; and

(3) Describe how staff or service providers support clients served through branch offices.

§749.605. What minimum qualifications must all employees meet?

(a) An employee's behavior or health status must not present a danger to children in care.

(b) Each employee who is regularly or frequently present while children are in care must:

(1) Meet the requirements in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(2) Have a record of a tuberculosis screening, showing the employee is free of contagious TB as provided in §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?);

(3) Be physically, mentally, and emotionally capable of performing assigned tasks and must have the skills necessary to perform assigned tasks; and

(4) Complete a notarized Licensing *Affidavit for Applicants for Employment* form, as specified in Human Resources Code, §42.059.

§749.609. What are the requirements for tuberculosis screening?

Before having contact with children in care, all caregivers, employees, contract staff, volunteers, foster home household members, and employees in foster homes must be screened for tuberculosis as provided in §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?).

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DIVISION 2. CHILD-PLACING AGENCY ADMINISTRATOR

40 TAC §§749.631, 749.633, 749.635, 749.637

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.633. Can a child-placing agency administrator be an administrator for two residential child-care operations?

(a) Except as provided in subsection (b) of this section, a child-placing agency administrator can be an administrator for two residential child-care operations, including a general residential operation or residential treatment center, if:

(1) Both operations are in good standing with Licensing;

(2) The size and scope of the operation are manageable by one person, which is clarified in the written professional staffing plans; and

(3) The person also holds a valid Child-Care Administrator License, if applicable; and

(4) At least one child-placing agency is not managing more than 25 foster homes.

(b) An agency that provides an assessment services program may designate their child-placing agency administrator or another employee as the person responsible for administering those services. The person designated must:

(1) Be a Licensed Child-Placing Agency Administrator;

(2) Have a master's degree in social work or a human services field from an accredited college or university and at least two years of supervised child-placing experience. The degree must include:

(A) A minimum of nine credit hours in graduate level courses that focus on family and individual function and interaction; and

(B) At least 350 hours of formal, supervised field placement or practicum with a social service or human services agency; or

(3) Have a master's degree in a human services field and at least three years of supervised child-placing experience.

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DIVISION 3. CHILD PLACEMENT STAFF

40 TAC §§749.661, 749.663, 749.665, 749.667, 749.669, 749.671, 749.673, 749.675, 749.677, 749.679

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.669. How do child placement management staff document approval?

Child placement management staff must review and approve by signing and dating the following documents:

(1) Assessment/admission forms;

(2) Initial and subsequent placement documents;

(3) Foster and adoptive home studies;

(4) Investigation reports;

(5) Foster home development and/or corrective action plans;

(6) Initial and updated service plans;

(7) Discharge or transfer plans and summaries;

(8) Any restrictions imposed on the child for more than seven days that have not been approved by the treatment director or service planning team, and any monthly re-evaluations of a restriction that continues for more than 30 days;

(9) Any restrictions to communication and visitation with family imposed on a child;

(10) Any restrictions to a particular room or building for more than 24 hours imposed on a child; and

(11) Child placement staff contacts with children per §749.665 of this title (relating to What are the requirements for contact between child placement staff and children in care?).

§749.673. What are the qualifications that an employee must have to perform child placement activities?

In addition to the requirements that all employees must meet, employees who perform child placement activities must meet the following qualifications:
Figure: 40 TAC §749.673

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DIVISION 4. TREATMENT DIRECTOR

40 TAC §§749.721, 749.723, 749.725, 749.727

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. TREATMENT SERVICES PROVIDED BY NURSING PROFESSIONALS

40 TAC §749.741, §749.743

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.741. What treatment services must a registered nurse provide if I support a child with primary medical needs?

(a) A registered nurse must be on staff or on contract, individually or through an agency, to respond to emergencies, questions, or other medical issues.

(b) A registered nurse must:

(1) Perform a nursing assessment of the child to include documentation of the child's diagnosed medical needs and selection of placement;

(2) Lead the service planning process for the child's care including registered nurse delegation of tasks or exemption from RN delegation in compliance with 22 Texas Administrative Code, Chapters 224 and 225 of the Texas Board of Nurse Examiners rules;

(3) Review medical records, including compliance with written physician orders;

(4) Contact other professionals, as needed, for the child's care;

(5) Monitor the implementation of the child's service plan; and

(6) Document outcomes for interventions used in the child's care.

§749.743. In what circumstances may a physician or registered nurse (including an advanced practice registered nurse) delegate nursing tasks to unlicensed caregivers?

The physician or registered nurse may delegate nursing tasks to unlicensed caregivers only if all delegation criteria are met for the task to be delegated, including, but not limited to:

(1) Compliance with 22 Texas Administrative Code, Chapters 224 and 225 of the Texas Board of Nurse Examiners rules;

(2) The nursing task is one that a reasonable and prudent physician or registered nurse would find is within the scope of sound nursing judgment to delegate;

(3) The physician or registered nurse determines that the nursing task can be properly and safely performed by the unlicensed caregiver without jeopardizing the child's welfare;

(4) The agency employing or contracting with the unlicensed caregivers develops and follows a protocol, with input from a physician or registered nurse, for the instruction and training of unlicensed caregivers performing nursing tasks. The protocol must address:

(A) An established mechanism for identifying those individuals to whom nursing tasks may be designated;

(B) The manner in which the instruction addresses the complexity of the delegated task;

(C) The manner in which the unlicensed caregivers demonstrate the competency of the delegated task; and

(D) The mechanism for re-evaluation of the competency;

(5) The training protocol recognizes that the final decision as to what nursing tasks can be safely delegated in any specific situation is within the specific scope of the physician's or registered nurse's professional judgment; and

(6) A physician or registered nurse instructs unlicensed caregivers in performing nursing tasks.

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DIVISION 6. CONTRACT STAFF AND VOLUNTEERS

40 TAC §§749.761, 749.763, 749.767, 749.769, 749.771

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.761. What are the requirements for a volunteer?

(a) You must maintain a personnel record for each volunteer.

(b) The personnel record must include a statement signed and dated by the volunteer indicating he must immediately report any suspected incident of abuse, neglect, or exploitation to the Child Abuse Hotline and the agency's administrator or administrator's designee.

(c) If the volunteer provides short-term services through an agency or an organization, you must be aware of and approve the organization or agency's policies on volunteer short-term services before the volunteer can have contact with children.

§749.763. Are there additional requirements for a volunteer or contractor that performs employee or caregiver functions?

(a) A volunteer or contractor that performs any employee or caregiver function must meet the same requirements as an employee or caregiver who performs that function.

(b) You must maintain records documenting how these requirements are met.

§749.769. Can I use a volunteer that is on probation, parole, or referred for community service through the courts?

No, a person that is not being compensated may not provide services to an operation, if that person is on probation or parole, or is referred for community services through the courts because of criminal activity, including as an alternative to incarceration. This prohibition applies even if the services do not involve contact with children in care.

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SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT

DIVISION 1. DEFINITIONS

40 TAC §749.801

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 2. ORIENTATION

40 TAC §749.831, §749.833

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 3. PRE-SERVICE EXPERIENCE AND TRAINING

40 TAC §§749.861, 749.863, 749.865, 749.867, 749.869

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.863. What are the pre-service hourly training requirements for caregivers and employees?

(a) Caregivers and certain employees must complete the following training hours before the noted timeframe:
Figure: 40 TAC §749.863(a)

(b) You must document the completion of each training requirement in the appropriate personnel record.

§749.867. Must I provide pre-service training to a caregiver or employee who was previously a caregiver or employee for a child-placing agency?

(a) A caregiver is exempt from completing the eight hours of general pre-service training if he has been a caregiver for a residential child-care operation during the past 12 months.

(b) A caregiver or employee is exempt from completing the pre-service training regarding emergency behavior intervention if he:

(1) Has been a caregiver for or employed by a residential child-care operation during the past 12 months;

(2) Has received training during the past 12 months in the types of emergency behavior intervention used at your agency; and

(3) Can demonstrate knowledge and competency of the training material, both in writing and in physical techniques.

(c) You must document the exemption factors in the appropriate personnel record.

§749.869. What are the instructor requirements for providing pre-service training?

(a) A qualified instructor must deliver the pre-service training.

(b) The training must be instructor led.

(c) A health-care professional or a pharmacist must provide training in administering psychotropic medication. The trainer must assess each participant after the training to ensure that the participant has learned the course content.

(d) To provide training in emergency behavior intervention the:

(1) Instructor must be certified in a recognized method of emergency behavior intervention, or be able to document knowledge of:

(A) The emergency behavior intervention;

(B) The course material;

(C) Training delivery methods and techniques; and

(D) Training evaluation or assessment methods and techniques;

(2) Training must be competency-based and require participants to demonstrate skill and competency at the end of the training.

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DIVISION 4. GENERAL PRE-SERVICE TRAINING

40 TAC §§749.881, 749.883, 749.885

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.881. What curriculum components must be included in the general pre-service training?

The general pre-service training curriculum must include the following components:

(1) Topics appropriate to the needs of children for whom the caregiver will be providing care, such as developmental stages of children, fostering children's self-esteem, constructive guidance and discipline of children, strategies and techniques for monitoring and working with these children, and age-appropriate activities for the children;

(2) The different roles of caregivers;

(3) Measures to prevent, identify, treat, and report suspected occurrences of child abuse (including sexual abuse), neglect, and exploitation;

(4) Procedures to follow in emergencies, such as weather related emergencies, volatile persons, and severe injury or illness of a child or adult; and

(5) Preventing the spread of communicable diseases.

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DIVISION 5. PRE-SERVICE TRAINING REGARDING EMERGENCY BEHAVIOR INTERVENTION

40 TAC §749.901, §749.903

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.903. If I allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?

(a) If you allow the use of emergency behavior intervention, at least 75% of the pre-service training curriculum regarding emergency behavior intervention must focus on early identification of potential problem behaviors and strategies and techniques of less restrictive interventions, including the components listed in §749.901 of this title (relating to If I do not allow the use of emergency behavior intervention, what curriculum components must be included in the pre-service training regarding emergency behavior intervention?).

(b) The training does not have to address the use of any type of emergency behavior intervention that your policies do not allow.

(c) The other 25% of the pre-service training curriculum regarding emergency behavior intervention must include the following components:

(1) Different roles and responsibilities of caregivers qualified in emergency behavior intervention versus employees or volunteers who are not qualified in emergency behavior intervention;

(2) Escape and evasion techniques to prevent harm to the child and caregiver without requiring the use of an emergency behavior intervention;

(3) Safe implementation of the restraint techniques and procedures that are appropriate for the age and weight of children served and permitted by the rules in this chapter and your policies and procedures;

(4) The physiological impact of emergency behavior intervention;

(5) The psychological impact of emergency behavior intervention, such as flashbacks from prior abuse;

(6) How to adequately monitor the child during the administration of an emergency behavior intervention to prevent injury or death;

(7) Monitoring physical signs of distress and obtaining medical assistance;

(8) Health risks for children associated with the use of specific techniques and procedures;

(9) Drawings, photographs, or videos of each personal restraint permitted by your policy; and

(10) Strategies for re-integration of children into the environment after the use of emergency behavior intervention, including the debriefing of caregivers and the child.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. ANNUAL TRAINING

40 TAC §§749.931, 749.933, 749.935, 749.937, 749.939, 749.941, 749.945, 749.947, 749.949

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.931. What are the annual training requirements for caregivers and employees?

Caregivers and employees must complete the following training hours: Figure: 40 TAC §749.931

§749.933. When must an employee or caregiver complete the annual training?

(a) Each person must complete the annual training:

(1) Within 12 months from the date of his employment; and

(2) During each subsequent 12-month period.

(b) You have the option of prorating the person's annual training requirements from the date of employment to the end of the calendar year or the end of the agency's fiscal year and then beginning a new 12-month period that coincides with the calendar or fiscal year.

§749.935. What types of hours or instruction can be used to complete the annual training requirements?

(a) If the training complies with the other rules in this division (relating to Annual Training), annual training may include hours or CEUs earned through:

(1) Workshops or courses offered by local school districts, colleges or universities, or Licensing;

(2) Conferences or seminars;

(3) Self-instructional training, excluding training on emergency behavior intervention, first-aid, and CPR;

(4) Planned learning opportunities provided by child-care associations or Licensing; or

(5) Planned learning opportunities provided by a child-placing agency administrator, professional contract service provider, professional service provider, treatment director, child placement management staff, child placement staff, contractor, or caregiver who meets minimum qualifications in the rules of this chapter; or

(6) The hours attending college or a professional credentialing or registry program.

(b) For annual training hours, you may count:

(1) The hours of annual training that a person received at another child-placing agency, general residential operation, or residential treatment center, if the person:

(A) Received the training within the time period you are using to calculate the person's annual training; and

(B) Provides documentation of the training;

(2) Annual emergency behavior intervention training;

(3) First-aid and CPR training;

(4) The hours of pre-service training that the person earns in addition to the required pre-service hours. For example, if a person completes 24 hours of pre-service emergency behavior intervention training, and is required to obtain 16 hours, that person may count eight of the hours toward annual training requirements;

(5) Half of the hours spent developing initial training curriculum that is relevant to the population of children served. No additional credit hours for training curriculum development are permitted for repeated training sessions; and

(6) One-fourth of the hours spent updating and making revisions to training curriculum that is relevant to the population of children served.

(c) For annual training hours, you may not count:

(1) Orientation training;

(2) Pre-service training;

(3) The hours involved in case staffings and conferences with the supervisor; or

(4) The hours presenting training to others.

(d) No more than one-third of the required annual training hours may come from self-instructional training.

(e) If a person earns more than the minimum number of training hours required during a particular year, the person can carry over to the next year a maximum of 10 training hours.

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DIVISION 7. FIRST-AID AND CPR CERTIFICATION

40 TAC §§749.981, 749.983, 749.985, 749.987, 749.989

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.981. What first-aid and cardiopulmonary resuscitation (CPR) certification must caregivers have?

(a) Before a caregiver can be the only caregiver responsible for a child in care, the caregiver must be certified in:

(1) First-aid, with rescue breathing and choking; and

(2) CPR for infants, children, and adults.

(b) A caregiver who is a health professional can use documentation of the following in lieu of these certifications:

(1) The training to be a health professional includes the knowledge covered in first aid and/or CPR training; and

(2) The person's employment ensures that these skills are kept current.

§749.989. What documentation must I maintain for first-aid and CPR certification?

(a) You must document the completion of each training requirement in the appropriate personnel records. The documentation may be a certificate, letter, or a statement of successful completion, that is signed and dated, from the training source. A photocopy of the original first-aid and/or CPR certificate or letter may be maintained in the personnel record, as long as the employee can provide an original document upon request by Licensing.

(b) The documentation must include the following information:

(1) The participant's name;

(2) Date of the training;

(3) Title or subject of the training;

(4) The trainer's name and qualifications;

(5) The expiration date of the certification as determined by the organization providing the certification; and

(6) Length of the training in hours.

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SUBCHAPTER G. CHILDREN'S RIGHTS

40 TAC §§749.1001, 749.1003, 749.1005, 749.1007, 749.1009, 749.1011, 749.1013, 749.1015, 749.1017, 749.1019, 749.1021

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1003. What rights does a child in care have?

(a) A child's rights are cumulative of any other rights granted by law or other Licensing rules.

(b) You must adhere to the child's rights, including:

(1) The right to appropriate care and treatment in the least restrictive setting available that can meet the child's needs;

(2) The right to be free from discrimination on the basis of gender (if your agency accepts both genders), race, religion, national origin, or sexual orientation;

(3) The right to have his physical, emotional, developmental, educational, social and religious needs met;

(4) The right to be free of abuse, neglect, and exploitation as defined in Texas Family Code §261.401;

(5) The right to be free from any harsh, cruel, unusual, unnecessary, demeaning, or humiliating punishment, which includes:

(A) Shaking the child;

(B) Subjecting the child to corporal punishment;

(C) Threatening the child with corporal punishment;

(D) Any unproductive work that serves no purpose except to demean the child, such as moving rocks from one pile to another or digging a hole and then filling it in;

(E) Denying the child food, sleep, toileting facilities, mail, or family visits as punishment;

(F) Subjecting the child to remarks that belittle or ridicule the child or the child's family; and

(G) Threatening the child with the loss of placement or shelter as punishment;

(6) The right to discipline that is appropriate to the child's age and developmental level;

(7) The right to have restrictions or disciplinary consequences explained to him when the measures are imposed;

(8) The right to a humane environment, including any treatment environment, which provides reasonable protection from harm and appropriate privacy for personal needs;

(9) The right to receive educational services appropriate to the child's age and developmental level;

(10) The right to training in personal care, hygiene, and grooming;

(11) The right to reasonable opportunities to participate in community functions, including recreational and social activities such as Little League teams, Girl Scouts and Boy Scouts, and extracurricular school activities outside of the agency to the extent that is appropriate for the child;

(12) The right to have adequate personal clothing, which must be suitable to his age and size and comparable to the clothing of other children in the community;

(13) The right to have personal possessions at his home and to acquire additional possessions within reasonable limits;

(14) The right to be provided with adequate protective clothing against natural elements such as rain, snow, wind, cold, sun, and insects;

(15) The right to maintain regular contact with his family unless the child's best interest, appropriate professionals, or court necessitates restrictions;

(16) The rights to send and receive uncensored mail, to have telephone conversations, keep a personal journal and to have visitors, unless the child's best interest, appropriate professionals, or court order necessitates restrictions;

(17) The right to hire independent mental health professionals, medical professionals, and attorneys at his own expense;

(18) The right to be compensated for any work done for the agency or home as part of the child's service plan or vocational training, with the exception of assigned routine duties that relate to the child's living environment, such as cleaning his room, or other chores, or work assigned as a disciplinary measure;

(19) The right to have personal earnings, allowances, possessions, and gifts as the child's personal property;

(20) The right to be able to communicate in a language or any other means that is understandable to the child at admission or within a reasonable time after an emergency admission of a child, if applicable. You must make every effort to place a child with foster parent(s) who can communicate with the child. If these efforts are not

successful, you must document in the preliminary service plan your plan to meet the communication needs of the child;

(21) The right to confidential care and treatment;

(22) The right to consent in writing before permitting any publicity or fund raising activity for the agency, including the use of his photograph;

(23) The right not to be required to make public statements acknowledging his gratitude to the foster home or agency;

(24) The right to be free of unnecessary or excessive medication;

(25) The right to have a comprehensive service plan that addresses the child's needs, including transitional and discharge planning;

(26) The right to participate in the development and review of his service plan within the limits of the child's comprehension and ability to manage the information;

(27) The right to receive emotional, mental health, or chemical dependency treatment separately from adults (other than young adults) who are receiving services;

(28) The right to receive appropriate treatment for physical problems that affect his treatment or safety;

(29) The right to be free from pressure to get an abortion, relinquish her child for adoption, or to parent her child, if applicable; and

(30) The right to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation.

§749.1005. How must I inform a child and the child's parents of their rights?

(a) Within seven days after you admit a child into your agency, you must review the child's rights with the child and a child's parent, unless the parent's consent is not required. You must also provide the child and a child's parent with a written copy of the child's rights.

(b) Child rights must be written in:

(1) Simple, non-technical terms; and

(2) English, unless the person does not understand English. The child's rights must be written in the person's primary language, if possible.

(c) If the person you are informing has a visual or auditory impairment, you must explain the child's rights in a manner that is understandable to the person.

(d) The person you are informing of the child's rights must sign a statement indicating that the person has read and understands these rights. You must put the signed copy in the child's record.

§749.1007. What are a child's rights regarding education?

(a) A child must have an appropriate education through participation in an educational/vocational program in the most appropriate and least restrictive educational settings, for example: attending regular classes conducted in an accredited elementary, middle, or secondary school within the community.

(b) Foster parents and caregivers must, as applicable:

(1) Attend and participate in school staffings, conferences, and education planning meetings;

(2) Make reasonable efforts to allow the child to participate in extracurricular activities; and

(3) Make reasonable efforts to allow the child to participate in school extracurricular activities to the extent of his interests and abilities and in accordance with his service plan.

§749.1009. What right does a child have regarding contact with a parent?

(a) You must allow contact between a child and his parent whose parental rights have not been terminated according to:

(1) Your policies; and

(2) The provisions of a court order or any visitation agreement.

(b) You must document in the child's record:

(1) Any plans for contact between the child and a parent; and

(2) Any decision to limit contact with a parent.

(c) Before you can temporarily restrict ongoing contacts or communication between the child and a parent, your child placement management staff must:

(1) Explain the reasons for the restrictions to the child and the child's parent; and

(2) Document the reasons in the child's record.

(d) Restrictions imposed by you that continue more than 30 days must be re-evaluated monthly by your child placement management staff, who also must:

(1) Explain the reasons for the continued restrictions to the child and the child's parents; and

(2) Document the reasons in the child's record.

(e) If you limit communications or visits with a parent for practical reasons, such as geographical distance or expense, you must discuss the limits with the child and the child's parents. You must document the limits in the child's record.

§749.1011. What right does a child have regarding contact with siblings?

(a) A child must have a reasonable opportunity for sibling visits and contacts in an effort to preserve sibling relationships.

(b) You must address plans for sibling visits and contacts in the child's record.

(c) When contact is restricted or not allowed, you must include justification in the child's record. If the restriction lasts more than 90 days, you must document the justification for continuing the restriction in the child's record at least every 90 days.

(d) If barriers to visits exist, such as unavoidable geographic distance and expense issues, the agency must make provisions for sibling contact through letters, telephone calls, or some other means.

§749.1013. What right to privacy does a child have with respect to his contact with others?

(a) Except as determined by child placement management staff or the child's parent, you may not:

(1) Open or read the child's incoming or outgoing mail, including electronic mail, unless necessary to assist the child with reading or writing; or

(2) Listen to or screen the child's telephone calls unless the child needs assistance with using the telephone.

(b) You must document in the child's record:

(1) Any reason for restricting the child's mail or telephone calls; and

(2) A listing of the mail or telephone calls that you restrict.

(c) You must inform the child and parent about restrictions that you place on the child.

(d) Restrictions that continue for more than 30 days must be re-evaluated monthly by your child placement management staff, who also must:

(1) Explain the reasons for the continued restrictions to the child; and

(2) Document the reasons in the child's record.

§749.1015. Under what circumstances may I conduct a search for prohibited items or items that endanger a child's safety?

(a) A child's possessions must be free of unreasonable searches and unreasonable removal of personal items.

(b) You may search a child, his possessions, or his room only when you have reasonable suspicion:

(1) Of the presence of a prohibited item or an item that endangers the child's safety;

(2) That the child made suicidal threats or threatened to hurt himself or others; or

(3) That the child or children was involved in theft.

(c) Only a caregiver may conduct searches that involve the removal of clothing, other than outer clothing, such as coats, jackets, hats, gloves, shoes, or socks.

(d) If a search of a child who is five years old or younger involves the removal of clothing (other than outer clothing), another adult must witness the search.

(e) If a search of a child who is over the age of five involves the removal of clothing (other than outer clothing), an adult of the same gender must witness the search.

(f) The caregiver must ensure that other children do not witness a search that involves the removal of clothing, other than outer clothing.

§749.1019. What must a caregiver document regarding a search?

A caregiver must document the following in the child's record when conducting a search if it results in the removal of personal items or clothing worn by the child:

(1) The date of the search;

(2) The name of the child;

(3) Reason for the search;

(4) A description of what was searched;

(5) The articles of clothing removed, if applicable;

(6) The name of the person conducting the search;

(7) The name of the witness, if applicable;

(8) The results of the search; and

(9) The resolution of the issue with the child or children involved.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. FOSTER CARE SERVICES: ADMISSION AND PLACEMENT
DIVISION 1. ADMISSIONS

40 TAC §§749.1101, 749.1103, 749.1105, 749.1107, 749.1109, 749.1111, 749.1113, 749.1115

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1101. What children may I admit?

(a) You may only admit children who meet your admission policy guidelines and whose needs you can meet. If you adopt a change in your admission policies that requires a change in the conditions of your permit, you must request an amendment to your permit with us. You can only accept children:

(1) Whose age and gender are specified on your permit; and

(2) Needing the services that are specified on your permit.

(b) Each placement must meet the child's physical, medical, recreational, educational, and emotional needs as identified in the child's admission assessment.

§749.1103. After a child in my care turns 18 years old, may the person remain in my care?

(a) A young adult may remain in your care up to the age of 22 years old in order to:

(1) Transition to independence, including attending college or vocational or technical training;

(2) Attend high school, a program leading to a high school diploma, or GED classes;

(3) Complete your program; or

(4) Stay with a minor sibling.

(b) A young adult who turns 18 in your care may remain in your care indefinitely if the person:

(1) Continues to need the same level of care; and

(2) Is unlikely to physically and/or intellectually progress over time.

§749.1105. May I admit a young adult into care?

You may admit a young adult into your care:

(1) From another residential child-care operation if the reason for admittance is consistent with a condition listed in §749.1103 of this title (relating to After a child in my care turns 18 years old, may the person remain in my care?); or

(2) If the child is in the care of the Texas Department of Family and Protective Services.

§749.1107. What information must I document in the child's record at the time of admission?

(a) You must include the following in the child's record at the time of admission:

(1) The child's name, gender, race, religion, date of birth, and birthplace;

(2) Court orders establishing who is the managing conservator for the child, if applicable;

(3) The name, address, and telephone number of the managing conservator(s), the primary caregivers for the child, any person with whom the child is allowed to leave the foster home, and any other individual who has the legal authority to consent to the child's medical care;

(4) The names, addresses, and telephone numbers of biological or adoptive parents, unless parental rights have been terminated;

(5) The names, addresses, and telephone numbers of siblings;

(6) The date of admission;

(7) Medication the child is taking;

(8) The child's immunization record;

(9) Allergies, such as food, medication, sting, and skin allergies;

(10) Chronic health conditions, such as asthma or diabetes;

(11) Known contra-indications of the use of restraint;

(12) Identification of the child's treatment needs, if applicable, and any additional treatment services or programmatic services the child is receiving; and

(13) A copy of the placement agreement, if applicable.

(b) For emergency admissions, you must meet the requirements in Division 4 of this subchapter (relating to Emergency Admission).

§749.1111. What orientation must I provide a child?

(a) Within seven days of admission, you must provide orientation to each newly admitted child who is not an infant or a toddler. You must gear orientation to the intellectual level of the child.

(b) For a child functioning at a school age level, orientation must include information about your policies on the following:

(1) Visitation, including family visitation and overnight visitation;

(2) Mail;

(3) Telephone calls;

(4) Gifts;

(5) Personal possessions, including any limits placed on the possessions the child may or may not have;

(6) Emergency behavior intervention, including your agency's policies and practices on the use of personal restraint;

(7) Discipline;

(8) The religious program and practices;

(9) The educational program;

(10) Trips away from the home;

(11) Program expectations and rules; and

(12) Grievance procedures.

(c) For a child functioning above toddler age and below school age, orientation must include as many of the items in subsection (b) of this section as possible.

(d) You must document in the child's record when the orientation occurred, any item that the orientation did not include, and the reason that the orientation did not include that item.

§749.1113. What information must I share with the parent at the time of placement?

(a) The parent must be able to determine whether your program and/or practices are appropriate for the child and can meet the child's needs.

(b) At admission, you must review and provide written materials to the parent placing the child that explain:

(1) Information about the policies that you would present a child during orientation;

(2) Your policies regarding the:

(A) Use of volunteers or sponsoring families;

(B) Type and frequency of notifications made to parents; and

(C) Involvement of the child in any publicity and/or fund raising activity for the agency; and

(3) The parent's right to refuse to or withdraw consent for a child to participate in:

(A) Research programs; and/or

(B) Publicity and/or fund raising activities for the agency.

§749.1115. What information must I provide caregivers when I admit a child?

(a) By the day you admit the child for care, you must provide the caregivers responsible for the child's care with information about the child's immediate needs, such as enrolling the child in school or obtaining needed medical care or clothing.

(b) You must inform appropriate caregivers of any special needs, such as medical or dietary needs or conditions.

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DIVISION 2. ADMISSION ASSESSMENT

40 TAC §§749.1131, 749.1133, 749.1135, 749.1137

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1131. When must I complete the admission assessment?

You must complete a non-emergency admission assessment according to the time frames required in §749.1133 of this title (relating to What information must an admission assessment include?). For an emergency admission assessment, see §749.1187 of this title (relating to For an emergency admission, when must I complete all of the requirements for an admission assessment?).

§749.1133. What information must an admission assessment include?

(a) An admission assessment must provide an initial evaluation of the appropriate placement for a child, and ensure that you obtain the information necessary for you to facilitate service planning.

(b) Prior to a child's non-emergency admission, an admission assessment must be completed which includes:

(1) The child's legal status;

(2) A description of the circumstances that led to the child's referral for substitute care;

(3) A description of the child's behavior, including appropriate and maladaptive behavior, and any high-risk behavior posing a risk to self or others;

(4) Any history of physical, sexual, or emotional abuse or neglect;

(5) Current medical and dental status, including the available results of any medical and dental examinations;

(6) Current mental health and substance abuse status, including available results of any psychological or psychiatric examination;

(7) The child's current developmental level of functioning;

(8) The child's current educational level, and any school problems;

(9) Any applicable requirements of §749.1135 of this title (relating to What are the additional admission requirements when I admit a child for treatment services?);

(10) Documentation indicating efforts made to obtain any of the information in paragraphs (1)-(9) of this subsection, if any information is not obtainable;

(11) The services you plan to provide to the child;

(12) Immediate goals of placement;

(13) The parent's expectations for placement, duration of the placement, and family involvement;

(14) The child's understanding of the placement;

(15) A determination of whether you can meet the immediate needs of the child: and

(16) A rationale for the appropriateness of the admission.

(c) Prior to completing a child's initial service plan, the following information must be added to the admission assessment:

(1) The child's social history. The history must include information about past and existing relationships with the child's birth parents, siblings, extended family members, and other significant adults and children, and the quality of those relationships with the child;

(2) A description of the child's home environment and family functioning;

(3) The child's birth and neonatal history;

(4) The child's developmental history;

(5) The child's mental health and substance abuse history;

(6) The child's school history, including the names of previous schools attended and the dates the schools were attended, grades earned, and special achievements;

(7) The child's history of any other placements outside the child's home, including the admission and discharge dates and reasons for placement;

(8) The child's criminal history, if applicable;

(9) The child's skills and special interests;

(10) Documentation indicating efforts made to obtain any of the information in paragraphs (1)-(9) of this subsection, if any information is not obtainable;

(11) The services you plan to provide to the child, including long-range goals of placement;

(12) Recommendations for any further assessments and testing;

(13) A recommended behavior management plan;

(14) A determination of whether you can meet the needs of the child, based on an evaluation of the child's special strengths and needs; and

(15) A rationale for the appropriateness of the admission.

(d) You must attempt to obtain a signed authorization, so you can subsequently request in writing materials from the child's current or most recent placement, such as the admission assessment, professional assessments, and the discharge summary. You must consider information from these materials when you complete your admission assessment if they are made available to you.

§749.1135. What are the additional admission requirements when I admit a child for treatment services?

When you admit a child for treatment services, you must do the following, as applicable:
Figure: 40 TAC §749.1135

§749.1137. What if I cannot obtain the required information for an admission assessment?

(a) You must make reasonable efforts to obtain all required information.

(b) If you and the child's parent determine that attempting to get information at the time of placement would not be in the child's best interests, you may postpone attempting to acquire the information.

(c) In the child's admission assessment, you must document why a:

(1) Particular piece of information is unavailable; or

(2) Delay obtaining a piece of information is necessary, including efforts made to obtain the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. REQUIRED ADMISSION INFORMATION

40 TAC §§749.1151, 749.1153, 749.1155

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 4. EMERGENCY ADMISSION

40 TAC §§749.1181, 749.1183, 749.1185, 749.1187, 749.1189

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1183. What constitutes an emergency admission to my child-placing agency?

You may admit a child on an emergency basis if the child:

(1) Is being removed from a situation involving alleged abuse or neglect;

(2) Is an alleged perpetrator of abuse and cannot be served in the child's current placement due to his perpetrating behaviors;

(3) Displays behavior that is an immediate danger to himself or to others and cannot function or be served in his current setting;

(4) Is abandoned and after exercising reasonable efforts the child's identity cannot be immediately determined. The efforts made to obtain information on the child's identity must be documented in the child's record;

(5) Is removed from his home or placement, and there is an immediate need to find a residence for the child;

(6) Is released to your authorized child-placing agency by a law enforcement or juvenile probation officer; or

(7) Is without adult care.

§749.1189. At the time of an emergency admission, what information must I document in the child's record at admission?

At the time of the emergency admission you must document in the child's record:

(1) A brief description of the circumstances necessitating the emergency admission;

(2) The date and time of admission;

(3) Allergies, such as food, medication, sting, and skin allergies;

(4) Chronic health conditions, such as asthma or diabetes;

(5) Known contra-indications to the use of restraint; and

(6) For the purpose of providing treatment services:

(A) A brief description of the child's history;

(B) The child's current behavior; and

(C) Your evaluation of how the placement will meet the child's needs and best interests.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. FOSTER CARE PLACEMENT

40 TAC §§749.1251, 749.1253, 749.1255

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 6. SUBSEQUENT PLACEMENT

40 TAC §749.1281

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§749.1281. What are the requirements when I move a child from one foster home to another?

(a) If the move is not an emergency, child placement management staff must:

(1) Review and approve the move before you move the child to the new placement;

(2) Document the review and approval in the child's record, including signature and date; and

(3) Comply with the pre-placement requirements in §749.1251 of this title (relating to What are the requirements for pre-placement visits for a child?).

(b) If the move is an emergency, child placement management staff must:

(1) Give verbal approval before the move; and

(2) Document the verbal approval in the child's record within 10 days of the placement. Documentation must be signed and dated and include the date verbal approval was given and circumstances of the emergency placement.

(c) For all moves, child-placing staff must prepare a child according to §749.1253 of this title (relating to What must staff do to prepare a child for a placement?).

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SUBCHAPTER I. FOSTER CARE SERVICES: SERVICE PLANNING, DISCHARGE

DIVISION 1. SERVICE PLANS

40 TAC §§749.1301, 749.1305, 749.1307, 749.1309, 749.1311, 749.1313, 749.1315, 749.1317, 749.1319, 749.1321, 749.1323

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1301. What are the requirements for a preliminary service plan?

(a) You must complete a preliminary service plan that addresses the immediate needs of the child, such as enrolling the child in school or obtaining needed medical care or clothing, within 72 hours of the child's admission.

(b) In addition, for a child receiving treatment services the preliminary service plan must include:

(1) A description of the child's immediate treatment and care needs;

(2) A description of the child's immediate, educational, medical, and dental needs, including possible side effects of medications or treatment prescribed to the child;

(3) A description of how you will meet the child's needs, including any necessary increased supervision or follow-up actions of possible side effects of medication or treatment provided to the child;

(4) The identification of any issues or concerns the child may have that could escalate a child's behavior. Identification of a child's issues or concerns must serve to avoid the use of unnecessary emergency behavior interventions with the child. Child concerns may include issues with food, eye contact, physical touch, personal property, or certain topics; and

(5) A designation of who will be responsible for meeting each of the child's needs.

(c) The plan must be compatible with the information included in the child's admission assessment.

(d) You must document the plan in the child's record.

(e) You must inform each professional service provider and caregiver working with a child about the child's preliminary service plan.

(f) You must implement and follow the preliminary service plan.

§749.1309. What must a child's initial service plan include?

(a) You must base the child's initial service plan on the child's needs identified in the child's admission assessment. The service planning team may prioritize the child's service planning goals and objectives based on the child's admission assessment. However, any required service plan components not initially addressed must have a justification for the delay in addressing the needs.

(b) The child's initial service plan must be documented in the child's record and include those items that a preliminary plan must include (see §749.1301 of this title (relating to What are the requirements for a preliminary service plan?)), and the items noted below for each specific type of service that you provide the child:
Figure: 40 TAC §749.1309(b)

§749.1311. Who must be involved in developing an initial service plan?

(a) A service planning team must develop the service plan. The team must consist of:

(1) At least one of the child's current caregivers;

(2) At least one professional service provider who provides direct services to the child; and

(3) If you are providing treatment services to the child, at least two of the following professionals:

(A) A licensed professional counselor;

(B) A psychologist;

(C) A psychiatrist or physician;

(D) A licensed registered nurse;

(E) A licensed masters level social worker;

(F) A licensed or registered occupational therapist; or

(G) Any other person in a related discipline or profession that is licensed or regulated in accordance with state law.

(b) The child, as appropriate, and the parents must be invited to the meeting to develop the service plan.

§749.1313. When must I inform the child's parent(s) of an initial service plan meeting?

(a) You must give the child's parent(s) at least two weeks advance notice of the review.

(b) The child's record must include documentation of the notice and any responses from the parents.

§749.1319. What must I document regarding a professional service provider's participation in the development of an initial service plan?

(a) You must document the professional service provider's:

(1) Name; and

(2) Date of participation.

(b) The professional service provider must sign and date the document. If the provider disagrees with any portion of the plan, the provider must document the issue(s) of contention before signing it.

§749.1321. With whom do I share the initial service plan?

(a) You must give a copy or summary of the initial service plan to the:

(1) Child, when appropriate;

(2) Child's parents; and

(3) Child's caregivers.

(b) If you do not share the service plan or summary with the child, you must document your justification for not sharing the plan in the child's record.

(c) You must document in the child's record that you provided a copy or summary of the service plan to the child's parents.

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DIVISION 2. SERVICE PLAN REVIEW AND UPDATES

40 TAC §§749.1331, 749.1333, 749.1335, 749.1337, 749.1339

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1331. How often must I review and update a service plan?

Except for when the child's placement within your agency changes because of a change in the child's needs, you must review and update the service plan as follows:
Figure: 40 TAC §749.1331

§749.1333. How does a child's transfer affect the timing of the review of the child's service plan?

(a) You must review a child's service plan whenever the child's placement changes because of a change in the child's needs.

(b) If the child's placement changes for another reason:

(1) The child' service planning team must approve the decision not to review the plan; and

(2) You must document the decision not to review the plan.

§749.1335. How do I review and update a service plan?

To review and update a service plan, you must:

(1) Evaluate the child's progress and the effectiveness of strategies and techniques used toward meeting identified needs, including educational progress reports and medical interventions;

(2) Identify any new needs and strategies or techniques to meet these needs, including instructions to appropriate employees;

(3) Document any achieved or changed objectives;

(4) If the review shows no progress towards meeting the identified needs of the child, document reasons for continued placement;

(5) Evaluate the possible effectiveness and side effects in the use of psychotropic medications prescribed for the child, any change in psychotropic medications during the period since the last review, and the behaviors and reactions of the child observed by caregivers, professional service providers, and parents, if applicable;

(6) Document visitation and contacts between the child and the child's parents, the child and the child's siblings, and the child and the child's extended family;

(7) Update the estimated length-of-stay and discharge plans, if changed;

(8) Determine for children receiving treatment services for emotional disorders, pervasive developmental disorders, or primary medical needs whether to:

(A) Continue the placement;

(B) Continue the placement as child-care services;

(C) Transfer the child to a less restrictive setting; or

(D) Refer the child to an inpatient hospital;

(9) Evaluate the use and effectiveness of emergency behavior intervention techniques, if used, since the last service plan. If applicable, this evaluation must focus on:

(A) The frequency, patterns, and effectiveness of types of emergency behavior interventions;

(B) Strategies to reduce the need for emergency behavior interventions overall; and

(C) Specific strategies to reduce the need for use of personal restraints or emergency medication, as applicable;

(10) Document in the child's record the review and update of the plan; and

(11) Document the names of the persons participating in the review and update.

§749.1337. Are the notification, participation, implementation, and documentation requirements for a service plan review and update the same as for an initial service plan?

Yes, the same requirements found in Division 1 of this subchapter (relating to Service Plans) apply to a service plan review and update.

§749.1339. How often must I re-evaluate the intellectual functioning of a child receiving treatment services for mental retardation?

(a) Each child's intellectual functioning must be re-evaluated at least every three years by a psychologist qualified to provide psychological testing; or

(b) A psychologist must determine the need and frequency for a specific child's intellectual functioning to be re-evaluated, such as a young child who may require more frequent testing. This determination, including justification for the time frame, must be documented in the child's record annually by the service planning team.

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DIVISION 3. DISCHARGE AND TRANSFER PLANNING

40 TAC §§749.1361, 749.1363, 749.1365, 749.1367, 749.1369, 749.1371, 749.1373, 749.1375, 749.1377, 749.1379

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1361. What does "the transfer of a child in care" mean?

A transfer refers to a child in care who is moved from one of your programs or foster homes to another one of your programs or foster homes operated under the same permit or at the same location.

§749.1363. Who must plan a child's non-emergency discharge or transfer?

(a) You must involve at least the following persons in planning the child's non-emergency discharge or transfer:

(1) At least one of the child's current caregivers; and

(2) At least one professional service provider involved in the child's service planning.

(b) You must invite the following persons to participate in planning the child's non-emergency discharge or transfer, if appropriate:

(1) The child;

(2) The child's parent(s); and

(3) Any other person pertinent to the child's care.

(c) If you are unable to plan the transfer or discharge with the persons required in subsections (a) and (b) of this section, you must document in the child's record the reason why.

(d) If a child in your care is not receiving treatment services, you must inform him of his non-emergency discharge or transfer at least four days prior to the date of the discharge or transfer, unless your licensed child-placing agency administrator or child placement management staff has clear justification for not giving him such notice. The licensed child-placing agency administrator or child placement management staff who determines the justification for the child not having the advance notice of the discharge or transfer, must put the justification in writing and sign and date it. The justification must be in the child's record.

(e) If a child in your care is receiving treatment services, you must inform him of his non-emergency discharge or transfer at least four days prior to the date of the discharge or transfer, unless your treatment director, three members of the child's service planning team, or the child's psychiatrist or psychologist has a justification for not giving him such notice. Whoever determines the justification for the child not having the advance notice of the discharge or transfer must put the justification in writing and sign and date it. The justification must be in the child's record.

§749.1367. To whom can I discharge a child in a non-emergency situation?

You must discharge a child to the child's parent or to anyone with written authorization from the parent or a person authorized by the court or by law to assume custody of the child.

§749.1371. What must I document in the child's record regarding a planned discharge or transfer?

Your documentation of a planned discharge or transfer is called a "discharge or transfer summary" and must include:

(1) A discharge or transfer summary showing services provided to the child, accomplishments, assessment of remaining needs, and recommendations about the services to meet those needs;

(2) The date and circumstances of the discharge or transfer;

(3) Discharge or transfer medications and/or prescriptions for medications;

(4) Support resources for the child, including telephone numbers and addresses;

(5) Aftercare plans and recommendations, including medical, psychiatric, psychological, dental, educational, and social appointments;

(6) Date and time the child was informed of his discharge or transfer; and

(7) For discharges, the name, address, telephone number and relationship of the person to whom you discharge the child, unless the child legally consents to his discharge. If the child legally consents to his discharge and does not want to involve the child's parent(s), you must document this in the child's record.

§749.1373. When I discharge a child to another agency or residential child care operation, what information must I provide them?

(a) On or before the child's discharge, you must attempt to obtain legal consent to release the discharge summary and the information in subsection (b) of this section. If consent is not obtained, your attempt to obtain consent must be documented in the child's record. If consent is obtained, the information must be provided to the receiving operation within 30 days of the date the child is discharged.

(b) Copies of the following information from the child's record must also be released with the discharge summary:

(1) The child's background information, including progress notes for the past 60 days if applicable;

(2) Any unresolved incidents or investigations involving the child, if applicable;

(3) Assessments and/or evaluations that you have performed for the child, including the child's admission assessment, diagnostic assessment, educational assessment, neurological assessment, and psychiatric or psychological evaluation;

(4) The child's service plans while in your care for the past 12 months;

(5) A list of medications the child is taking, the dosage, frequency, and reason the medication was prescribed; and

(6) Any treatment for a physical condition that is in progress and requires continuing or follow-up medical care.

§749.1377. What constitutes an emergency discharge or transfer?

An emergency transfer or discharge occurs when:

(1) The parent withdraws a child unexpectedly from care;

(2) There is a medical emergency requiring inpatient care;

(3) The child is absent from the home and cannot be located; or

(4) There is an immediate danger to the child or others and you determine that you cannot serve the child.

§749.1379. What must I document in the child's record at the time of an emergency discharge or transfer?

At the time of an emergency discharge or transfer, you must document the following in the child's record:

(1) The circumstances necessitating the emergency discharge or transfer;

(2) The explanation given to the child regarding the reason for the discharge or transfer;

(3) The child's reaction to the discharge or transfer;

(4) The date of discharge or transfer; and

(5) The name, address, and relationship of the person to whom you transfer or discharge the child, where applicable.

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SUBCHAPTER J. FOSTER CARE SERVICES: MEDICAL AND DENTAL

DIVISION 1. MEDICAL AND DENTAL CARE

40 TAC §§749.1401, 749.1403, 749.1405, 749.1409, 749.1411, 749.1413, 749.1415, 749.1417, 749.1421, 749.1423, 749.1425, 749.1427, 749.1429, 749.1431, 749.1433, 749.1435

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1405. Who must perform medical care examinations and provide medical treatment for a child?

A health-care professional licensed in the United States to practice in an appropriate medical or health-care discipline must perform medical care examinations and provide medical treatment for a child.

§749.1409. What general dental requirements must my agency meet?

(a) A children in your care must receive dental care:

(1) Initially, according to the requirements in §749.1153 of this title (relating to What are the dental requirements when I admit a child into care?);

(2) At as early an age as necessary;

(3) As needed for relief of pain and infections; and

(4) As needed for ongoing maintenance of dental health.

(b) The child's record must include a written record of each dental examination specifying the:

(1) Date of the examination;

(2) Procedures completed;

(3) Follow-up treatment recommended and any appointments scheduled;

(4) The child's refusal to accept dental treatment, if applicable; and

(5) The results of the dental examination that is signed and dated by the health-care professional who performed the examination.

(c) You must obtain follow-up dental work indicated by the examination, such as treatment of cavities and cleaning.

§749.1413. Who must perform dental examinations and provide dental treatment?

A health-care professional licensed in the United States to practice dentistry must provide dental care.

§749.1415. What health precautions must I take if a person in care, employee, caregiver, someone else in one of my foster homes, or someone else in my agency has a communicable disease?

(a) You must notify the Department of State Health Services (DSHS) after you become aware that a person in your care, an employee, a contract service provider, a caregiver, someone else in one of your foster homes, or a volunteer has contacted a communicable disease that the law requires you to report to the DSHS as specified in 25 TAC 97, Subchapter A (relating to Control of Communicable Diseases).

(b) If a person in your care has symptoms of a communicable disease that is reportable to the DSHS, you must:

(1) Consult a health-care professional about the person's treatment;

(2) Follow the treating physician's orders, which may include separating the person from others;

(3) Notify the person's parent, if applicable; and

(4) Sanitize all items used by the sick person before another person uses one of them.

(c) If a health-care professional diagnoses a person in care with a communicable disease that may be spread through casual contact, a health-care professional must authorize the person's participation in routine activity at the foster home. The authorization must:

(1) Be in the person's record;

(2) Include a written statement that the person will not pose a serious threat to the health of others; and

(3) Include any specific instructions and precautions to be taken for the protection of others.

(d) If an employee, a contract service provider, a caregiver, someone else in one of your foster homes, or a volunteer has a communicable disease that may be spread through casual contact, you must obtain written authorization from a health-care professional for the person to be present at the agency or foster home. The written authorization must include a statement that the person will not pose a serious threat to the health of others.

(e) You must follow any written instructions and precautions specified by a health-care professional.

§749.1417. Who must have a tuberculosis (TB) examination?

(a) All persons over the age of one year old who live, work, or volunteer at your agency or in one of your foster homes must be screened for tuberculosis as recommended by the Center for Disease Control (CDC). This includes contract service providers.

(b) If a person over one year old has lived, worked, or volunteered at a regulated residential child-care operation within 12 months prior to living, working, or volunteering at your agency or foster home, a new baseline tuberculosis screening is not required. However, you must have documentation of the person's previous screening on file at your agency. For example, an employee beginning employment in a regulated residential child-care operation for the first time would need a baseline tuberculosis screening. Employment in a different residential child-care operation would not require a new screening as long as a copy of the screening documentation went with the employee to each new place of employment. If the employee left employment in regulated residential child-care for more than 12 months and then returned, a new screening would be required.

(c) A copy of medical documentation of results of TB screening, chest radiograph, and/or treatment (if treatment is required) must be maintained in the person's file at the agency.

§749.1421. What immunizations must a child in my care have?

(a) Each child that you admit must meet and continue to meet applicable immunization requirements specified by §42.043 of the Human Resources Code and the Department of State Health Services.

(b) You must maintain current immunizations records for each child in your care.

(c) Unless exempt, all immunizations required for the child's age must:

(1) Be completed by the date of admission; or

(2) Begin within 30 days after admission.

§749.1425. What documentation is acceptable for an immunization record?

(a) An original or facsimile of the immunization record must include:

(1) The child's name and birth date;

(2) The number of doses and vaccine type;

(3) The month, day, and year the child received each vaccination; and

(4) One of the following:

(A) A signature or rubber stamp signature from the health-care professional who administered the vaccine; or

(B) A registered nurse's documentation of the immunization that is provided by a health-care professional, as long as the health-care professional's name and qualifications are documented.

(b) Documentation of an immunization record on file at your agency may be:

(1) The original record;

(2) A photocopy;

(3) An official immunization record generated from a state or local health authority, such as a registry; or

(4) A record received from school officials, including a record from another state.

§749.1433. How often must the physician review a child's primary medical needs?

(a) A licensed physician must review a child's primary medical needs:

(1) At least every 90 days or on a schedule recommended by the child's physician; and

(2) Whenever a medical or related problem occurs.

(b) The review must address:

(1) Whether the child can continue to be cared for appropriately in the foster home; and

(2) Any new or changed orders regarding the items outlined in §749.1135 of this title (relating to What are the additional requirements when I admit a child for treatment services?).

(c) Documentation of each physician review must be filed in the child's record.

§749.1435. What are the requirements for using a nasogastric tube?

(a) Only the following may insert a nasogastric tube:

(1) A physician;

(2) A licensed nurse according to a physician's written orders; or

(3) A caregiver instructed by a licensed nurse according to a physician's written orders.

(b) The caregiver must document each insertion in the child's record. The documentation for each insertion must include the:

(1) Signature of the nurse or caregiver who inserted the tube; and

(2) Date of the insertion.

(c) The caregiver must follow the physician's written orders concerning the tube.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. ADMINISTRATION OF MEDICATION

40 TAC §§749.1461, 749.1463, 749.1469

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1461. What consent must I obtain to administer medications?

(a) You must obtain a general written consent to administer routine, preventive, and emergency medications.

(b) You must obtain a written, signed, and dated consent, specific to the psychotropic medication to be administered, from the person legally authorized to give medical consent before administering a new psychotropic medication to a child, per §749.1603 of this title (relating to If my agency employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give consent before requesting his consent for the child to be placed on psychotropic medication?) or §749.1605 of this title (relating to If my agency does not employ or contract with the health-care professional who prescribes psychotropic medications to a child in care, what information must I provide the person legally authorized to give medical consent prior to the health-care professional prescribing psychotropic medications to a child in care?).

§749.1463. What medication requirements must caregivers meet?

(a) To the best of their knowledge, caregivers must inform the person legally authorized to give medical consent of the benefits, risks, and side effects of all prescription medication and treatment procedures used and the medical consequences of refusing them, and/or provide the name and telephone number of the prescribing health-care professional for more information.

(b) Caregivers must:

(1) Be informed about possible side effects of medications administered to the child;

(2) Store all medication in the original container unless you have an additional container with the same label and instructions;

(3) Administer all medications according to the instructions on the label or according to a prescribing health-care professional's subsequent signed orders;

(4) Administer each child's medication immediately after preparation;

(5) Ensure the child has taken the medication as prescribed;

(6) Ensure a person trained in and authorized to administer prescription medication administers the medication to a child in care unless the child is on a self-medication program;

(7) Maintain any documentation provided by the health-care professional on the administration of current prescription medication;

(8) Not physically force a child to take prescription medication;

(9) Ensure that your employees do not provide any prescription medication or treatment to a child except on written orders of a health-care professional;

(10) Not borrow or administer prescription medication to a child that is prescribed to another person; and

(11) Not administer prescription medication to more than one child from the same container. Only the child for whom the prescription medication was prescribed may use the medication.

§749.1469. What are the requirements for administering nonprescription medication and vitamins?

(a) You must follow the label and ensure the nonprescription medication is not contraindicated with any other medication prescribed to the child or the child's medical conditions.

(b) You may give nonprescription medication or vitamins to more than one child from one container.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. SELF-ADMINISTRATION OF MEDICATION

40 TAC §749.1501, §749.1503

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 4. MEDICATION STORAGE AND DESTRUCTION

40 TAC §749.1521, §749.1523

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the

Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1521. What medication storage requirements must a foster home meet?

A foster home must:

(1) Store medication in a locked container;

(2) Keep medication inaccessible other than to caregivers responsible for stored medication;

(3) Ensure the medication storage area has a separate container where medications "for external use only" are stored separately from other medications;

(4) Store medication covered by Section II of the Texas Controlled Substances Act under double lock in a separate container. For example, a double lock can include a lock on the cabinet or filing cabinet and the door to the closet where medications are stored;

(5) Make provisions for securely storing medication that requires refrigeration;

(6) Keep medication storage area(s) clean and orderly;

(7) Remove discontinued medication immediately and destroy it in a way that ensures that children do not have access to it;

(8) Remove medication on or before the expiration date and destroy it in a way that ensures that children do not have access to it;

(9) Remove medication of a discharged or deceased child immediately and destroy it in a way that ensures that children do not have access to it; and

(10) Provide prescription medication to the person to whom a child is discharged or transferred if the child is taking the medication at that time.

§749.1523. What are the requirements for discontinued or expired medication?

Foster parents must properly destroy medication in accordance with state and federal law and in a way that ensures children do not have access to it, within 30 days after:

(1) It has been discontinued for a child;

(2) The expiration date has passed; or

(3) The child has left care without the medication.

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DIVISION 5. MEDICATION RECORDS

40 TAC §§749.1541, 749.1543, 749.1545

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1541. What records must caregivers maintain for each child receiving medication?

(a) Caregivers must maintain a cumulative record of all prescription medication dispensed to a child and all nonprescription medication, excluding vitamins, dispensed to a child under five years old. Caregivers must maintain the medication record during the time that they provide services to the child. This record must include the:

(1) Child's full name;

(2) Prescribing health-care professional's name, if applicable;

(3) Medication name, strength, and dosage;

(4) Date (day, month, and year) and the time the medication was administered;

(5) Name and signature of the person who administered the medication;

(6) Child's refusal to accept medication, if applicable; and

(7) Reasons for administering the medication, including the specific symptoms, condition, and/or injuries of the child that the caregiver is treating, for PRN prescriptions and nonprescription medications (excluding vitamins) for children under five years old.

(b) Identification of any prohibited prescription medication, nonprescription medication, and vitamins for each child must be maintained in the medication record, which must be incorporated into the child's record.

(c) The medication records of prescription and nonprescription medication dispensed to the child must be incorporated into the child's record.

§749.1543. Where must a child's medication records be maintained?

(a) The foster parents must maintain at the foster home the child's medication records for 30 days.

(b) Foster parents must submit copies of the child's medication records to you each month. You must file these medication records in the child's record.

(c) You must maintain copies of all the child's medication records for the length of time that you provide services to the child.

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DIVISION 6. MEDICATION AND LABEL ERRORS

40 TAC §§749.1561, 749.1563, 749.1565

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1561. What is a medication error?

A medication error includes, but is not limited to, the following:

(1) A child receives the wrong medication;

(2) A child receives medication prescribed to someone else;

(3) A child receives the wrong dosage of medication;

(4) A child receives medication at the wrong time;

(5) A medication dose is skipped or missed;

(6) A child receives expired medication;

(7) Not following the medication administration instructions, such as giving a child medication on an empty stomach when the medication should be given with food; and

(8) A child receives medication that was not stored as required to maintain the effectiveness of the medication, such as refrigerating or not refrigerating the medication or exposing the medication to heat or sunlight.

§749.1563. What must a caregiver do if the caregiver finds a medication error?

(a) If a caregiver finds a medication error regarding a prescribed medication, the caregiver must contact a health-care professional immediately, unless the error is the type described in paragraph (4) or (5) of §749.1561 of this title (relating to What is a medication error?), and follow the health-care professional's recommendations.

(b) If a caregiver finds a medication error regarding a nonprescription medication, the caregiver must take the appropriate and necessary actions as required by the circumstances.

(c) For all medication errors, a caregiver must document the following within 24 hours:

(1) The time and date of the error;

(2) The medication error;

(3) The time and date of the call(s) to the licensed health-care professional, if applicable;

(4) The name and title of the health-care professional contacted, if applicable; and

(5) The health-care professional's medical recommendations for ensuring the child's safety, if applicable.

§749.1565. What must a caregiver do if the caregiver finds a medication label error?

If a caregiver finds a medication label error, the caregiver must:

(1) Report the error to the pharmacist; and

(2) Have the label on the medication container corrected as soon as possible but no later than the next business day.

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DIVISION 7. SIDE EFFECTS AND ADVERSE REACTIONS TO MEDICATION

40 TAC §749.1581, §749.1583

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 8. USE OF PSYCHOTROPIC MEDICATION

40 TAC §§749.1603, 749.1605, 749.1607, 749.1609, 749.1611

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1609. What information must be documented about a child's use of psychotropic medication?

(a) You must ensure that caregivers maintain a daily record of the child's use of such medication according to the requirements in §749.1541 of this title (relating to What records must caregivers maintain for each child receiving medication?).

(b) Caregivers must document in the child's record a description of any noticeable change in the child's behavior in response to the medication.

(c) You must provide the information in subsection (b) of this section to the prescribing health-care professional or the child's current health-care professional to use in evaluating the appropriateness of continuing the medication. You must document the health-care professional's evaluation and review in the child's record.

§749.1611. If my agency employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, what are the requirements for evaluating whether a child should continue taking a psychotropic medication?

(a) If a child takes psychotropic medications, the prescribing health-care professional must evaluate and document in the child's medication record a description of the child's response to the medication and an assessment of its effectiveness and the appropriateness of continuing the medication on at least a quarterly basis. The written evaluation must include any reasons for discontinuing the medication.

(b) If the health-care professional decides that he can evaluate the appropriateness of continuing the medication without seeing the child, you do not have to schedule an appointment for the evaluation.

(c) The health-care professional must consider the target symptoms and treatment goals in evaluating the child's use of psychotropic medications.

(d) The health-care professional must document whether the child needs to continue taking the medication. You must document the health-care professional's decision in the child's record.

(e) If the health-care professional does not substantiate the effectiveness of a specific psychotropic medication within 90 days, the health-care professional must provide a written rationale for continuing the medication for an additional period. The continuation of the medication may not exceed an additional 90 days (for a total of 180 days) if the health-care professional does not substantiate effectiveness. A copy of the written rationale must be documented in the child's record.

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DIVISION 9. PROTECTIVE DEVICES

40 TAC §§749.1641, 749.1643, 749.1645, 749.1647

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1641. What is a protective device?

(a) A protective device:

(1) Protects a person from involuntary self-injurious behavior or permits wounds to heal; and

(2) Does not prohibit a person's mobility.

(b) Examples of a protective device are helmets, elbow guards, mittens, bedrails, and wheelchair seat belts.

(c) If used appropriately, devices intended to encourage mobility or minimally restrain a young child for safety purposes, such as wheelchairs, car seats, high chairs, strollers, bed rails, and child leashes manufactured and sold specifically to harness a young child for safety purposes, are not protective devices.

§749.1645. May I use protective devices?

(a) You may use protective devices if a licensed physician orders their use for a specific child. The orders must indicate the circumstances under which the protective device is permitted.

(b) You may not use protective devices as:

(1) Punishment;

(2) Retribution or retaliation;

(3) A means to get a child to comply;

(4) A convenience for caregivers or other persons; or

(5) A substitute for effective treatment or habilitation.

(c) You must document the use of protective devices in the child's record, service plan, and service plan reviews. The service planning team must discuss and document in the child's service plan reviews:

(1) Clinical justification for continued use of protective devices; and

(2) Ways to reduce the need for protective devices.

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DIVISION 10. SUPPORTIVE DEVICES

40 TAC §§749.1671, 749.1673, 749.1675

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1671. What is a supportive device?

(a) A supportive device used:

(1) To support a person's posture;

(2) To assist a person who cannot obtain and/or maintain normal physical functioning to improve his mobility and independent functioning; or

(3) As an adjunct to proper care and treatment, for example physical therapy.

(b) The purpose of a supportive device is not to restrict movement.

§749.1673. May I use supportive devices?

(a) You may use supportive devices if a licensed physician orders their use for a specific child. The orders must indicate the circumstances under which the supportive device is permitted.

(b) You may not use a supportive device as a substitute for appropriate nursing care.

(c) You may not use supportive devices that include tying or depriving or limiting the use of a child's hands or feet.

(d) You may not use supportive devices as:

(1) Punishment;

(2) Retribution or retaliation;

(3) Means to get a child to comply;

(4) A convenience for caregivers or other persons; or

(5) A substitute for effective treatment or habilitation.

(e) If a device is not specifically for assisting with sleep or safety during sleep, you must remove the device during rest periods.

(f) You must document the use of supportive devices in the child's record, service plan, and service plan reviews. The service planning team must discuss and document in the child's service plan reviews:

(1) Clinical justification for continued use of supportive devices; and

(2) Ways to reduce the need for supportive devices.

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SUBCHAPTER K. FOSTER CARE SERVICES: DAILY CARE, PROBLEM MANAGEMENT
DIVISION 1. ADDITIONAL REQUIREMENTS FOR INFANT CARE

40 TAC §§749.1801, 749.1803, 749.1805, 749.1807, 749.1809, 749.1811, 749.1813, 749.1815, 749.1817, 749.1819

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1803. What are the basic care requirements for an infant?

(a) Each infant must receive individual attention, including playing, talking, cuddling, and holding.

(b) A caregiver must provide prompt attention to an infant's physical needs, such as feeding and diapering.

(c) An infant's caregiver must ensure that the environment is safe. For example, free the area of objects that may choke or harm the infant, take measures to prevent electric shock, free the area of furniture that is in disrepair or unstable, and allow no unsupervised access to water to prevent the risk of drowning.

(d) An infant's caregiver must never leave the infant unsupervised. A sleeping infant is considered supervised if the caregiver is within eyesight or hearing range of the child and can intervene as needed, or if the caregiver uses a video camera or audio monitoring device to monitor the child and is close enough to the child to intervene as needed.

§749.1807. What specific safety requirements must my cribs meet?

(a) All cribs must have:

(1) A firm, flat mattress that snugly fits the sides of the crib. The mattress must not be supplemented with additional foam material or pads;

(2) Sheets that fit snugly and do not present an entanglement hazard;

(3) A mattress that is waterproof or washable;

(4) Secure mattress support hangers, and no loose hardware or improperly installed or damaged parts;

(5) A maximum of 2 3/8 inches between crib slats or poles;

(6) No corner posts over 1/16 inch above the end panels;

(7) No cutout areas in the headboard or footboard that would entrap a child's head or body; and

(8) Drop rails, if present, which fasten securely and cannot be opened by a child.

(b) Caregivers must sanitize each crib when soiled and before reassigning the crib to a different child.

(c) Caregivers must never leave children in the crib with the side down.

(d) The foster home must not have stackable cribs.

§749.1809. Are mesh cribs or port-a-cribs allowed?

A foster home may use a full-size, portable, or mesh-side crib if:

(1) Caregivers follow the manufacturer's instructions;

(2) The crib has:

(A) Mesh that is securely attached to the top rail, side rail, and floor plate; and

(B) Folded sides that securely latch in place when raised;

(3) Caregivers never leave a child in a mesh-sided crib with a side folded down; and

(4) If you become aware of a recall for the port-a-crib used, you must discontinue its use.

§749.1813. What types of equipment may a foster home not use with infants?

(a) A foster home may not use any of the following types of equipment with infants:

(1) Baby walkers;

(2) Baby bungee jumpers;

(3) Accordion safety gates; and

(4) Toys that are small enough to swallow or choke a child.

(b) Children may not sleep on bean bags, waterbeds, or foam pads.

(c) A foster home may not use soft bedding, such as stuffed toys, quilts, pillows, bumper pads, and comforters in a crib for an infant six months old or younger.

§749.1815. Are infants required to sleep on their backs?

Yes. Caregivers must place an infant not yet able to turn over on his own in a face-up sleeping position unless a health-care professional orders otherwise.

§749.1819. What are the specific requirements for feeding an infant?

(a) Caregivers must feed an infant based on the recommendations of the infant's licensed physician.

(b) Unless recommendations from the service team are contrary, caregivers must hold the infant while feeding him if the infant is:

(1) Birth through six months old; or

(2) Unable to sit unassisted in a high chair or other seating equipment during feeding.

(c) Caregivers must never prop a bottle by supporting it with anything other than the child or adult's hand.

(d) A caregiver who cares for more than one infant must:

(1) Not permit the infant to share bottles or training cups; and

(2) Clean high chair trays before each use.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. ADDITIONAL REQUIREMENTS FOR TODDLER CARE

40 TAC §749.1841

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§749.1841. What are the basic care requirements for a toddler?

(a) Each toddler must receive individual attention, including playing, talking, and cuddling.

(b) A toddler's caregiver must ensure that the environment is safe. For example, free the area of objects that may choke or harm the toddler, take measures to prevent electric shock, free the area of furniture that is in disrepair or unstable, and allow no unsupervised access to water to prevent the risk of drowning.

(c) A toddler's caregiver must never leave the toddler unsupervised. A sleeping toddler is considered supervised if the caregiver is within eyesight or hearing range of the child and can intervene as needed, or if the caregiver uses a video camera or an audio monitoring

device to monitor the child and is close enough to the child to intervene as needed.

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DIVISION 3. ADDITIONAL REQUIREMENTS FOR PREGNANT CHILDREN

40 TAC §§749.1861, 749.1863, 749.1865

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1861. What information must I provide a pregnant child regarding her pregnancy?

You must:

(1) Ensure information, training, and counseling is available regarding health aspects of pregnancy, preparation for child birth, and recovery from child birth;

(2) Ensure the pregnant child receives nutritional counseling and guidance that meets generally accepted standards, including nutrition during pregnancy, lactation, and foods to avoid; and

(3) Inform the child of her right to be free from pressure to get an abortion, relinquish her child for adoption, or to parent her child.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. EDUCATIONAL SERVICES

40 TAC §§749.1891, 749.1893, 749.1895

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1891. What responsibilities do I have for the education of a child in care?

(a) You must arrange an appropriate education for each child, including:

(1) Ensuring the child in care attends an educational facility or program that is approved or accredited by the Texas Education Agency, the Southern Association of Colleges and Schools, the Texas Private School Accreditation Commission unless approved by the child's service planning team with documented justification;

(2) Ensuring a school-age child has the training and education in the least restrictive setting necessary to meet the child's needs and abilities;

(3) For a child attending an accredited educational facility or program, ensuring the facility or program that implements a special education student's individual education plan (IEP); and

(4) Advocating that a school-age child receives the educational and related services to which he is entitled under provisions of federal and state law and regulations.

(b) For children receiving treatment services you must designate a liaison between the agency and the child's school.

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DIVISION 5. RECREATIONAL SERVICES

40 TAC §§749.1921, 749.1923, 749.1925, 749.1927

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1921. What responsibilities do foster parents have for providing a child with opportunities for recreational activities?

(a) Caregivers must provide daily indoor and outdoor recreational and other activities appropriate to the needs, interests, and abilities of the children so every child may participate.

(b) Except for written medical orders to the contrary, your programs for non-ambulatory children must include:

(1) Physical fitness development that prescribes a variety of body positions; and

(2) Changes in environment.

(c) Each child must have individual free time as appropriate to the child's age and abilities.

(d) Caregivers must provide the following types of recreational activities based on each individual child's needs:
Figure: 40 TAC §749.1921(d)

§749.1923. What physical fitness activities must caregivers provide for a child receiving treatment services for primary medical needs or mental retardation?

(a) A child receiving treatment services for primary medical needs or mental retardation must have a minimum of one hour of physical stimulation each day.

(b) Training programs for non-mobile children must include development of physical fitness. This must include a variety of body positions and changes in environment.

§749.1925. What type of daily schedule must caregivers provide for a child receiving treatment services for primary medical needs or mental retardation?

A child receiving treatment services for primary medical needs or mental retardation must have a schedule that is based on the normalization principle. In order to help the child obtain an existence as normal as possible, the daily schedule must:

(1) Demonstrate an understanding of normal child development; and

(2) Enhance the child's physical, emotional, and social development.

§749.1927. To what extent must a child receiving treatment services for primary medical needs or mental retardation have community living experiences?

The child's surroundings and experiences must reflect normal patterns of community living as closely as possible and as appropriate for the child's special needs.

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DIVISION 6. DISCIPLINE AND PUNISHMENT

40 TAC §§749.1951, 749.1953, 749.1955, 749.1957, 749.1959, 749.1961

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.1951. What are the requirements for disciplinary measures?

(a) Only a caregiver known to and knowledgeable of a child may discipline the child.

(b) Each disciplinary measure must:

(1) Be consistent with your policies and procedures;

(2) Not be physically or emotionally damaging to the child;

(3) Be individualized to meet each child's needs;

(4) Be appropriate to the child's level of understanding, age, and developmental level; and

(5) Be appropriate to the incident and severity of the behavior demonstrated.

(c) The goal of each disciplinary measure must be to teach the child acceptable behavior and self-control. The caregiver must explain the reason for the disciplinary measure when the caregiver imposes the measure.

§749.1957. What other methods of punishment are prohibited?

In addition to corporal punishment, prohibited discipline techniques include, but are not limited to:

(1) Any harsh, cruel, unusual, unnecessary, demeaning, or humiliating discipline or punishment;

(2) Denial of mail or visits with their families as discipline or punishment;

(3) Threatening with the loss of placement as discipline or punishment;

(4) Using sarcastic or cruel humor and verbal abuse;

(5) Maintaining an uncomfortable physical position, such as kneeling, or holding his arms out;

(6) Pinching, pulling hair, biting, or shaking a child;

(7) Putting anything in or on a child's mouth, such as soap or tape;

(8) Humiliating, shaming, ridiculing, rejecting, or yelling at a child;

(9) Subjecting a child to abusive or profane language;

(10) Placing a child in a dark room, bathroom, or closet;

(11) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age;

(12) Confining a child to a highchair, box, or other similar furniture or equipment as discipline or punishment;

(13) Denying basic child rights as a form of discipline or punishment;

(14) Withholding food that meets the child's nutritional requirements; and

(15) Using or threatening to use emergency behavior intervention as discipline or punishment.

§749.1959. To what extent may a caregiver restrict a child's activities as a behavior management tool?

(a) Within limits, a foster parent may restrict a child's activities as a behavior management tool.

(b) Restrictions of activities, other than school or chores, which will be imposed on a child for more than 30 days, must be reviewed with and approved by the child placement management staff or treatment director prior to or within 24 hours of imposing the restriction.

(c) Restrictions to a particular room or building that will be imposed on a child for more than 24 hours must have approval from the service planning team, a professional service provider, or treatment director prior to or within 24 hours of imposing the restriction.

(d) You must inform the child and parent about any such restrictions you place on the child.

(e) Documentation of all approvals, justification for the restriction, and informing the child and parents must be in the child's record.

§749.1961. May a person in care discipline or punish another person in care?

No. A person in care must not discipline or punish another person in care except when babysitting under §749.2599 of this title (relating to Can a child serve as a caregiver?).

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SUBCHAPTER L. FOSTER CARE SERVICES: EMERGENCY BEHAVIOR INTERVENTION
DIVISION 1. DEFINITIONS

40 TAC §749.2001

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§749.2001. What do certain words mean in this subchapter?

These words have the following meaning in this subchapter:

(1) Chemical restraint--A type of emergency behavior intervention that uses chemicals or pharmaceuticals through topical application, oral administration, injection, or other means to immobilize or sedate a child as a mechanism of control. The use of medications that have a secondary effect of immobilizing or sedating a child, but are prescribed by a treating health-care professional and administered solely for medical or dental reasons, is not chemical restraint and is not regulated as such under this chapter.

(2) De-escalation--See §749.43(12) of this title (relating to What do certain words and terms mean in this chapter?).

(3) Emergency behavior intervention--See §749.43(16) of this title.

(4) Emergency medication--A type of emergency behavior intervention that uses chemicals or pharmaceuticals through topical application, oral administration, injection, or other means to modify a child's behavior. The use of medications that have a secondary effect of modifying a child's behavior, but are prescribed by a treating health-care professional and administered solely for medical or dental reasons (e.g. benadryl for an allergic reaction or medication to control seizures), is not emergency medication and is not regulated as such under this chapter.

(5) Emergency situation--A situation in which attempted preventative de-escalatory or redirection techniques have not effectively reduced the potential for injury and it is immediately necessary to intervene to prevent:

(A) Imminent probable death or substantial bodily harm to the child because the child attempts or continually threatens to commit suicide or substantial bodily harm; or

(B) Imminent physical harm to another because of the child's overt acts, including attempting to harm others. These situations may include aggressive acts by the child, including serious incidents of shoving or grabbing others over their objections. These situations do not include verbal threats or verbal attacks.

(6) Mechanical restraint--A type of emergency behavior intervention that uses the application of a device to restrict the free movement of all or part of a child's body in order to control physical activity.

(7) Personal restraint--A type of emergency behavior intervention that uses the application of physical force without the use of any device to restrict the free movement of all or part of a child's body in order to control physical activity. Personal restraint includes escorting, which is when a caregiver uses physical force to move or direct a child who physically resists moving with the caregiver to another location.

(8) PRN--See §749.43(42) of this title (relating to What do certain words and terms mean in this chapter?).

(9) Prone restraint--Placing a child in a chest down restraint hold.

(10) Seclusion--A type of emergency behavior intervention that involves the involuntary separation of a child from other residents and the placement of the child alone in an area from which the resident is prevented from leaving by a physical barrier, force, or threat of force.

(11) Short personal restraint--A personal restraint that does not last longer than one minute before the child is released.

(12) Supine restraint--Placing a child in a chest up restraint hold.

(13) Transitional hold--The use of a temporary restraint technique that lasts no longer than one minute as part of the continuation of a longer personal or mechanical restraint.

(14) Triggered review--A review of a specific child's placement, treatment plan, and orders or recommendations for intervention, because a certain number of interventions have been made within a specified period of time.

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DIVISION 2. TYPES OF EMERGENCY BEHAVIOR INTERVENTION THAT MAY BE ADMINISTERED

40 TAC §§749.2051, 749.2053, 749.2055, 749.2059, 749.2061, 749.2063

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2051. What types of emergency behavior intervention may I administer?

(a) If permitted in your policies and you meet the requirements of this subchapter, a caregiver may administer the following types of emergency behavior intervention to a child in your care:

(1) Short personal restraint;

(2) Personal restraint; and

(3) Emergency medication.

(b) You may never administer chemical restraints, mechanical restraints, or seclusion.

(c) Protective and supportive devices, used appropriately, are not considered emergency behavior interventions. For information on protective and supportive devices, see Divisions 9 and 10 of Subchapter J of this chapter (relating to Foster Care Services: Medical and Dental).

§749.2053. Who may administer emergency behavior intervention?

Only a caregiver qualified in emergency behavior intervention may administer any form of emergency behavior intervention, except for the short personal restraint of a child.

§749.2055. What actions must a caregiver take before using a permitted type of emergency behavior intervention?

Before using a permitted type of emergency behavior intervention, the caregiver must:

(1) Attempt less restrictive behavior interventions that prove to be ineffective at defusing the situation; and

(2) Determine that the basis for the emergency behavior intervention is:

(A) An emergency situation;

(B) A need for a personal restraint to administer intramuscular medication or other medical treatments prescribed by a licensed physician, such as administering insulin to a child with diabetes; or

(C) A need for a personal restraint in a foster home where a child is significantly damaging property, such as breaking car windows or putting holes into walls. If this is the basis of the personal restraint, only a short personal restraint may be used and only to prevent the damage.

§749.2059. What is the appropriate use for a short personal restraint?

Generally, a short personal restraint is used in urgent situations, such as:

(1) To protect the child from external danger that causes imminent significant risk to the child, such as preventing the child from running into the street or coming into contact with a hot stove. The restraint must end immediately after the danger is averted;

(2) To intervene when a child under the age of five (chronological or developmental age) demonstrates disruptive behavior, if other efforts to de-escalate the child's behavior have failed; or

(3) When a child over five years old demonstrates behavior disruptive to the environment or milieu, such as disrobing in public, provoking others that creates a safety risk, or to intervene to prevent a child from physically fighting.

§749.2061. What precautions must a caregiver take when implementing a short personal restraint?

(a) When a caregiver implements a short personal restraint, the caregiver must:

(1) Minimize the risk of physical discomfort, harm, or pain to the child; and

(2) Use the minimal amount of reasonable and necessary physical force.

(b) A caregiver may not use any of the following techniques as a short personal restraint:

(1) A prone or supine restraint;

(2) Restraints that impair the child's breathing by putting pressure on the child's torso, including leaning a child forward during a seated restraint;

(3) Restraints that obstruct the airways of the child or impair the breathing of the child, including procedures that place anything in, on, or over the child's mouth, nose, or neck, or impede the child's lungs from expanding;

(4) Restraints that obstruct the caregiver's view of the child's face;

(5) Restraints that interfere with the child's ability to communicate or vocalize distress; or

(6) Restraints that twist or place the child's limb(s) behind the child's back.

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DIVISION 3. ORDERS

40 TAC §§749.2101, 749.2103, 749.2105, 749.2107

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2101. Are written orders required to administer emergency behavior intervention, and if so, who can write them?

According to the following chart, written orders by certain professionals are required to administer certain emergency behavior intervention:
Figure: 40 TAC §749.2101

§749.2105. What information must a written order include?

(a) All written orders must include the following:

(1) A statement that the particular type of emergency behavior intervention may only be used in an emergency situation;

(2) Designation of the specific intervention and procedure or technique that is authorized;

(3) Any specific measures for ensuring the child's health, safety, and well being, and the privacy of the setting that safeguards the child's personal dignity;

(4) A complete description of the behaviors and circumstances under which the intervention may be used;

(5) Instructions for observation or heightened observation of the child during the intervention;

(6) The behaviors that indicate the child is ready to be released from the intervention;

(7) The maximum length of time the child may be restrained regardless of behaviors exhibited;

(8) The prescribing professional's consideration of any potential medical and/or psychiatric contraindications for the specific child, such as a history of physical or sexual abuse or victimization involving the type of intervention; and

(9) Clinical justification for the intervention.

(b) For emergency medication, the written order must also include instructions on how to administer the medication.

§749.2107. Under what conditions are PRN orders permitted for a specific child?

PRN orders for certain emergency behavior interventions are permitted under the following conditions:
Figure: 40 TAC §749.2107

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DIVISION 4. RESPONSIBILITIES DURING ADMINISTRATION OF ANY TYPE OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §749.2151, §749.2153

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. ADDITIONAL RESPONSIBILITIES DURING ADMINISTRATION OF A PERSONAL RESTRAINT

40 TAC §§749.2201, 749.2203, 749.2205

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2205. What personal restraint techniques are prohibited?

(a) The following personal restraint techniques are prohibited:

(1) Restraints that impair the child's breathing by putting pressure on the child's torso, including restraints that obstruct the child's lungs from expanding such as leaning a child forward during a seated restraint;

(2) Restraints that obstruct the child's airway, including procedures that place anything in, on, or over the child's mouth, nose, or neck;

(3) Restraints that obstruct a caregiver's ability to view the child's face;

(4) Restraints that interfere with the child's ability to communicate or vocalize distress; or

(5) Restraints that twist or place the child's limb(s) behind the child's back.

(b) Prone and supine restraints are also prohibited as a short personal restraint.

(c) Prone and supine restraints are also prohibited as a personal restraint except:

(1) As a transitional hold that lasts no longer than one minute;

(2) As a last resort when other less restrictive interventions have proven to be ineffective; and

(3) When an observer meeting the following qualifications ensures the child's breathing is not impaired:

(A) Trained to identify risks associated with positional, compression, or restraint asphyxia; and

(B) Trained to identify risks associated with prone and supine holds.

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DIVISION 6. COMBINATIONS OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §749.2231, §749.2233

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 7. TIME RESTRICTIONS FOR EMERGENCY BEHAVIOR INTERVENTION

40 TAC §749.2281, §749.2283

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

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The new sections implement HRC, §42.042.

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DIVISION 8. GENERAL CAREGIVER RESPONSIBILITIES, INCLUDING DOCUMENTATION, AFTER THE ADMINISTRATION OF EMERGENCY BEHAVIOR INTERVENTION

40 TAC §§749.2301, 749.2303, 749.2305

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2301. What follow-up actions must caregivers take after the child's behavior no longer constitutes an emergency situation?

(a) The caregivers must take appropriate actions to help the child return to routine activities. The follow-up actions of the caregivers must include:

(1) Providing the child with an appropriate transition and offering the child an opportunity to return to regular activities;

(2) Observing the child for at least 15 minutes; and

(3) Providing the child with an opportunity to discuss the situation that led to the need for emergency behavior intervention and the caregiver's reaction to that situation. The discussion must be held in private as soon as possible and no later than 48 hours after the child's use of an emergency medication or release from any emergency behavior intervention.

(b) Caregivers involved in the emergency behavior intervention must conduct a post-emergency behavior intervention discussion. The goal of the discussion is to allow the child and caregiver to discuss:

(1) The child's behavior and the circumstances that constituted the need for an emergency behavior intervention;

(2) The strategies attempted before the use of the emergency behavior intervention and the child's reaction to those strategies;

(3) The emergency behavior intervention itself and the child's reaction to the emergency behavior intervention;

(4) How caregivers can assist the child in regaining self-control in the future to avoid the administration of an emergency behavior intervention; and

(5) What the child can do to regain self-control in the future to avoid the administration of an emergency behavior intervention.

(c) Caregivers involved in the emergency behavior intervention must:

(1) Debrief with child placing staff concerning the incident as soon as possible after the situation has stabilized; and

(2) Make reasonable efforts to debrief with children in care who witness the incident.

(d) The child placing staff must review the use of the emergency behavior intervention within 72 hours of the intervention.

(e) The caregivers do not have to return the child to previous activities or place the child in current activities that the group is participating in if the caregivers deem the child's participation is not in the best interests of the child or the other children in the group. However, caregivers must engage the child in an alternative routine activity.

(f) This rule does not apply to short personal restraint.

§749.2303. What must the caregiver document after discussing with the child the use of the emergency behavior intervention?

(a) The date and time the caregiver offered the discussion;

(b) The child's reaction to the opportunity for discussion;

(c) The date and time the discussion took place, if applicable; and

(d) The content of the discussion, if applicable.

§749.2305. When must a caregiver document the use of an emergency behavior intervention, and what must the documentation include?

(a) As soon as possible, but no later than 24 hours after the initiation of the intervention, the caregiver must document in the child's record the following information:

(1) The child's name;

(2) The basis for the emergency behavior intervention;

(3) A description and assessment of the circumstances and specific behaviors that caused the basis for the emergency behavior intervention;

(4) The de-escalation attempted before and during the use of the emergency behavior intervention and the child's reaction to those strategies;

(5) The specific emergency behavior intervention administered;

(6) The date and time the intervention was administered;

(7) The length of time the child was restrained;

(8) The name of the caregiver(s) that participated in the incident that led to the intervention, and who administered the intervention;

(9) The name of the person(s) who observed the child;

(10) The duration of the emergency behavior intervention;

(11) All attempts to explain to the child what behaviors were necessary for release from the intervention;

(12) The child's condition following the use of the medication or release from the intervention, including any injury the child sustained as a result of the intervention or any adverse effects caused by the use of the intervention; and

(13) The actions the caregiver(s) took to facilitate the child's return to normal activities following the end of the intervention.

(b) The child-placing staff must document their review of the use of the emergency behavior intervention within 72 hours of the incident.

(c) If personal restraint is used, documentation must also include the specific restraint techniques used, including a prone or supine restraint used as a transitional hold.

(d) If emergency medication is used, documentation must also include the specific medication used and the dosage administered to the child.

(e) This rule does not apply to short personal restraints.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 9. TRIGGERED REVIEWS

40 TAC §§749.2331, 749.2333, 749.2335, 749.2337, 749.2339

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2337. What must the triggered review include and what must be documented in the child's record?

The following must be included in a triggered review and documented in the child's record:

(1) The same items that must be included and documented in an initial service plan, (see §749.1309 of this title (relating to What must a child's initial service plan include?));

(2) A review of the records and orders of the emergency behavior interventions;

(3) A review and documentation of any potential medical or psychiatric reason for not using emergency behavior interventions on the child, including the prescribing professional's consideration of any potential medical and/or psychiatric contraindications for the specific child, such as a history of physical or sexual abuse or victimization involving the type of intervention;

(4) An examination of alternatives to manage the child's behavior and to assist the child in managing his own behavior; and

(5) A written plan for reducing the need for emergency behavior intervention.

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DIVISION 10. OVERALL OPERATION EVALUATION

40 TAC §749.2381, §749.2383

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2383. What data must be collected?

(a) Quarterly, you must collect, document, and review aggregate numbers of emergency behavior interventions by type of intervention with the exception of short personal restraints.

(b) This information must be reported to us quarterly.

(c) You must maintain the data for five years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER M. FOSTER HOMES: SCREENINGS AND VERIFICATIONS

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §§749.2401, 749.2403, 749.2405

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 2. FOSTER HOME SCREENINGS

40 TAC §§749.2441, 749.2443, 749.2445, 749.2447, 749.2449, 749.2451

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2441. Can I verify foster homes anywhere in the state?

(a) Each permit is limited to one DFPS region. We must approve an additional permit for each additional region.

(b) If you were licensed before January 1, 2007, you have five years from January 1, 2007, to comply with this requirement.

§749.2447. What information must I obtain for the foster home screening?

You must obtain, document, and assess the following information about a prospective foster home:
Figure: 40 TAC §749.2447

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DIVISION 3. VERIFICATION OF FOSTER HOMES

40 TAC §§749.2471, 749.2473, 749.2475, 749.2477, 749.2479, 749.2481, 749.2483, 749.2485, 749.2487, 749.2489, 749.2491, 749.2493

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2471. What must I do to verify a foster home?

Verifying a foster home includes the following steps:

(1) Completing and documenting the requirements for §749.2447 of this title (relating to What information must I obtain for the foster home screening?);

(2) Completing and documenting the required interviews as specified in §749.2449 of this title (relating to Whom must I interview when conducting a foster home screening?);

(3) Obtaining the following:

(A) A floor plan of the home showing dimensions and purposes of all rooms in the home and identifying indoor areas for children's use;

(B) A sketch or photo of the outside areas showing buildings, driveways, fences, storage areas, gardens, recreation areas, pools, ponds, or other bodies of water;

(C) An approved fire inspection; and

(D) An approved health inspection.

(4) Inspecting the home to ensure and document that the home meets appropriate rules of this chapter, including:

(A) Tuberculosis screening, see §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?);

(B) Subchapter K of this chapter (relating to Foster Care Services: Daily Care and Problem Management; and

(C) Subchapter O of this title (relating to Foster Homes: Health and Safety Requirements, Environment, Space and Equipment);

(5) If the home will provide treatment services, ensuring that the home complies with the policies developed according to §749.349 of this title (relating to What additional policies must I develop for foster homes that provide treatment services?);

(6) If the home will provide a transitional living program, ensuring the home complies with the policies developed according to §749.351 of this title (relating to What policies must I develop for foster parents who offer a transitional living program?);

(7) Evaluating all areas required for the foster home screening and verification, and make recommendations regarding the home's ability to work with children with respect to their age, gender, number of children, and services to be provided;

(8) Obtaining from the child placement management staff review and approval of the screenings, home study, and the recommended verification of the home; and

(9) Issuing a verification certificate that specifies the:

(A) Name of the foster home;

(B) Foster home address and/or location;

(C) The foster home's capacity, which includes the biological and adopted children of the caregivers who live in the foster home, any children receiving foster or respite child-care, and children for whom the family provides day care.

(D) The ages and gender(s) of children for which the home is verified; and

(E) The types of services the foster home will provide.

§749.2473. What must I do to verify a foster home that another child-placing agency has previously verified?

When a home has previously been verified by another agency, you may:

(1) Complete an entirely new screening and home study to comply with the requirements in §749.2471 of this title (relating to What must I do to verify a foster home?); or

(2) You may use the foster home screening and home study the previous child-placing agency conducted as a basis for meeting the requirement. You must update the information for every required section. You must describe any changes from the previous information. This verification will require you to:

(A) Conduct new interviews as specified in §749.2449 of this title (relating to Whom must I interview when conducting a foster home screening?);

(B) Conduct new criminal history and central registry background checks for foster home members, with results documented in the foster home record. Homes transferring from one agency to another, with children in care, may be verified by the receiving agency prior to completion of background checks;

(C) Document current fire and health inspections;

(D) Ensure that all appropriate household members have had a tuberculosis screening as required in §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?);

(E) Ensure that any unresolved deficiencies have been addressed;

(F) Conduct a new evaluation of all areas required for the foster home screening and verification, and make recommendations regarding the home's ability to work with children with respect to their age, gender, number of children, and services to be provided; and

(G) Obtain review and approval of the screening, home study, and the recommended verification of the home by child placement management staff.

§749.2475. To whom must I release information regarding a family on which I previously conducted a foster home screening, pre-adoptive home screening, post placement adoptive report, or home study?

(a) If background information is requested by a child-placing agency conducting a foster home screening, pre-adoptive home screening, post placement adoptive report, or home study, then you must release any background information you have acquired through a previous foster home screening, pre-adoptive home screening, post placement adoptive report, or home study.

(b) Background information must also be released to independent contractors who are hired or required by the court to conduct a foster home screening, pre-adoptive home screening, post placement adoptive report, or home study.

(c) An agency must release the background information to the requesting agency within 10 days after receiving the written request, including generally informing the requesting agency of any unresolved investigations and/or deficiencies. After the resolution of the investigations and/or deficiencies, the agency must release the remaining background information to the requesting agency within 10 days after the resolution of the investigations and/or deficiencies.

(d) Background information is any information that must be obtained by §749.2447(23) of this title (relating to What information must I obtain for the foster home screening?).

§749.2487. What are the requirements for an agreement that I have with a foster home that I verify?

(a) You must sign a written agreement with each agency foster home at the time that you verify the home. You and the foster home must each have copies of the signed agreement. You must file a copy in the agency home record.

(b) The agreement must specify the following:

(1) The foster parents' responsibility for complying with rules of this chapter;

(2) The financial agreement between you and the foster home;

(3) The foster home agrees not to admit a non-relative child for 24-hour care from any source other than you;

(4) You have the right to remove the child from the home at your discretion;

(5) You must consent to any discharge of a child from the home;

(6) Visits by the child's parents or relatives must be arranged through you;

(7) You are responsible for regular supervision of the foster home;

(8) The foster parents' commitment to comply with your policies regarding child care, discipline, supervision of children, and children's visits or trips away from the foster home; and

(9) The foster parents' commitment to comply with your policies about foster parents' reports to you regarding foster children and events or occurrences impacting the provision of foster care.

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DIVISION 4. TEMPORARY VERIFICATION

40 TAC §§749.2521, 749.2523, 749.2525

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. CAPACITY AND CHILD/CARE-GIVER RATIO

40 TAC §§749.2551, 749.2553, 749.2555, 749.2557, 749.2559, 749.2561, 749.2563, 749.2565, 749.2567

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2551. What is the maximum number of children a foster family home may care for?

(a) A foster family home may care for up to six children, including any biological and adopted children of the caregivers who live in the foster home and any children receiving foster or respite child-care, and children for whom the family provides day care.

(b) All adults in care must also be counted in the capacity of the home per §749.2651 of this title (relating to May a foster home accept adults into the home for care?).

§749.2553. What is the maximum number of children that a foster group home may care for?

(a) A foster group home may care for up to 12 children, including any biological and adopted children of the caregivers who live in the foster home and any children receiving foster or respite child-care.

(b) All adults in care must also be counted in the capacity of the home as specified in §749.2651 of this title (relating to May a foster home accept adults into the home for care?).

§749.2555. How do I determine capacity?

Capacity of the home is based on the:

(1) Number of caregivers, and the age of the children in the home and in placement;

(2) Services being provided and the needs of the children in care;

(3) Amount of space available for children; and

(4) Bathroom accommodations in the home.

§749.2557. May a foster home exceed its verified capacity?

No. The maximum number of children in a foster home, including the biological and adopted children of the caregivers who live in the foster home, any children receiving foster or respite child-care, and children for whom the family provides day care, must not exceed the capacity stated on the home's verification.

§749.2561. How many infants may a foster family home care for?

(a) A foster family home may only care for two infants at the same time unless you place more than two infants in a home in order to keep a single sibling group together.

(b) If the home cares for two infants or more according to subsection (a) of this section, it can only care for two additional children under six years of age.

(c) These restrictions include the biological and adopted children of the foster family, children in foster or respite child-care, and children for whom the family provides day care.

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DIVISION 6. SUPERVISION

40 TAC §§749.2591, 749.2593, 749.2595, 749.2597, 749.2599

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2593. What responsibilities does a caregiver have when supervising a child?

(a) The caregiver is responsible for:

(1) Knowing which children they are responsible for;

(2) Being aware of and accountable for each child's on-going activity;

(3) Providing the level of supervision necessary to ensure each child's safety and well being, including auditory and/or visual awareness of each child's on-going activity as appropriate;

(4) Being able to intervene when necessary to ensure each child's safety; and

(5) Not performing tasks that clearly impede the caregiver's ability to supervise and interact with the children while being responsible for the supervision of the children and meet any service-planning requirement regarding supervision of any child.

(b) In deciding how closely to supervise a child, the caregiver must take into account:

(1) The child's age;

(2) The child's individual differences and abilities;

(3) The indoor and outdoor layout of the home;

(4) Surrounding circumstances, hazards, and risks; and

(5) The child's needs, including the physical, mental, emotional, and social.

(c) Caregivers counted in the child/caregiver ratio must:

(1) Be aware of the children's habits, interests, and any special needs;

(2) Provide a safe environment;

(3) Cultivate developmentally appropriate independence in children through planned but flexible program activities;

(4) Positively reinforce children's efforts and accomplishments;

(5) Ensure continuity of care for children by sharing with incoming caregivers information about each child's activities during the previous shift and any verbal or written information or instructions given by the parent or other professionals; and

(6) Implement and follow the children's service plans.

(d) Caregivers that supervise a child receiving treatment services must maintain progress notes for the child, at a frequency determined by the service planning team. Caregivers must sign and date each progress note at the time the progress note is completed. Progress notes must be available for Licensing staff to review.

§749.2595. May I use a video camera to supervise a child in the child's bedroom?

(a) Video cameras may be used to supervise infants and toddlers.

(b) Video cameras may not be used to supervise children, other than infants and toddlers, unless the:

(1) Parent, or other person legally authorized to consent, consents to the use of the video camera; and

(2) Child:

(A) Is younger than five years old;

(B) Has primary medical needs; or

(C) Has a service plan that permits the use for purposes of reducing risks of sexually offensive behavior, physical aggression, or other behaviors identified as requiring heightened supervision, such as night terrors, sleepwalks, or resides in a bedroom with such a child. You must document the justification for the video camera in the child's service plan, and the child must have other accessible and reasonable locations where he may change his clothing in private.

(c) Video cameras may not be used to tape the child, and images may not be accessible except to the foster home's caregivers.

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DIVISION 7. RESPITE CHILD-CARE SERVICES

40 TAC §§749.2621, 749.2623, 749.2625, 749.2627, 749.2629, 749.2631, 749.2633, 749.2635

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2621. What are respite child-care services?

(a) Respite child-care services are a planned alternative 24-hour care that has the purpose of providing relief to the child's primary caregiver.

(b) For the purposes of this chapter, respite child-care placement is a placement that lasts more than 72 hours. The placement of a child in a home for less than 72 hours is not respite child-care.

§749.2623. What must occur before I place a child for respite child-care services?

You must notify the child's parent before placing the child in respite child-care services.

§749.2625. What information regarding the child must I share with the respite child-care services provider?

To ensure continuity of care, you must share the following information with the respite child-care services provider before placing the child in the home:

(1) Specific needs of a child, including:

(A) All psychiatric or medical treatment currently being provided;

(B) Medication regimen and medication instructions;

(C) Authorization for medical treatment; and

(D) Any other needs of a child that should be addressed by the respite child-care services provider;

(2) Non-routine events taking place in the life of the child;

(3) Emergency contact information, including the:

(A) Child's physician(s);

(B) Child's parent; and

(C) Agency's telephone number; and

(4) The child's history that may affect the provider's ability to provide care for the child, including:

(A) Background of abuse and/or neglect;

(B) Physical aggression or sexual behavior problems;

(C) Fire setting;

(D) Maiming or killing animals;

(E) Suicidal ideations and attempts; and

(F) Run-away behaviors.

§749.2627. What must occur before one of my foster homes accepts a child for respite child-care service?

(a) You must approve each occurrence of respite child-care services in your homes. Respite child-care services must not be provided if it could be detrimental to the child.

(b) Your child placement management staff must determine that the respite placement will not cause a conflict in care for any child that you have already placed in the foster home. The record of the foster home providing respite child-care services must include documentation of this determination.

§749.2629. In addition to the requirements of this division, what requirements of this chapter apply to respite child-care services that a foster home provides?

You and the foster home providing respite child-care must meet all requirements of the applicable rules of this chapter for all children in care, including children admitted for respite child-care services. This includes compliance with capacity and child/caregiver ratios and supervision rules.

§749.2631. How long may a child be in respite child-care services?

(a) With the exception of subsection (b) of this section, a child may be in respite child-care services for 14 consecutive days or 40 days each year.

(b) A respite child-care placement that is made because a child's foster home is under investigation for abuse or neglect does not count toward nor is it limited by the time frames noted in subsection (a) of this section. However, these placements are limited to a maximum of 60 days.

(c) If a child needs respite child-care services for more than 14 consecutive days or more than 60 days for an abuse or neglect investigation, this is considered a new placement and will not be respite child-care.

(d) When a child finishes a respite child-care placement, he may not return to respite child-care services for at least 10 days.

(e) Respite child-care must not be used if it could be detrimental to the child.

§749.2633. How frequently may a foster home provide respite child-care services?

(a) The home may not provide respite child-care services for more than:

(1) 14 consecutive days; or

(2) 60 days annually.

(b) A respite child-care placement that is made because a child's foster home is under investigation for abuse or neglect does not count toward nor is it limited by the time frames noted in subsection (a) of this section. However, these placements are limited to a maximum of 60 days.

(c) This rule does not apply to foster homes that exclusively provide respite child-care services.

§749.2635. May I place a child for respite child-care services in a home that Licensing does not regulate?

You may place a child for respite child-care services in a home that meets the requirements of the exemption set forth in §745.117(6) of this title (relating to Which programs of limited duration are exempt from Licensing regulation?).

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DIVISION 8. AGENCY--FOSTER FAMILY RELATIONSHIPS

40 TAC §§749.2651, 749.2653, 749.2655

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2651. May a foster home accept adults into the home for care?

(a) Foster homes may accept adults into the home for care if the adult:

(1) Is related to the foster family;

(2) Is a client in the Department of Aging and Disability Services, Community Based Services Program; or

(3) Meets one of the requirements of §749.1105 of this title (relating to May I admit a young adult into your care?).

(b) Adults in care must be counted in the capacity of the home.

§749.2653. What are the requirements for an unrelated adult to reside in a foster home?

(a) Before a foster home may add a new member to the household:

(1) The home must notify you of the potential new member of the household;

(2) The home must comply with requirements specified in Subchapter F of Chapter 745 of this title (relating to Background Checks) and §749.1417 of this title (relating to Who must have a tuberculosis (TB) examination?); and

(3) You must evaluate the effect that the adult will have on the foster children in the home. Your evaluation must include the following considerations:

(A) The needs of the foster children in care;

(B) The impact the adult will have in the foster family and for the foster children; and

(C) Whether the change in household will conflict with the children's best interest.

(b) You must document the following in the foster home record:

(1) The results of the background check and the tuberculosis screening;

(2) Your evaluation; and

(3) The approval of the child placement management staff.

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SUBCHAPTER N. FOSTER HOMES: MANAGEMENT AND EVALUATION

40 TAC §§749.2801, 749.2803, 749.2805, 749.2807, 749.2809, 749.2811, 749.2813, 749.2815, 749.2817, 749.2819, 749.2821, 749.2823, 749.2825

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2803. What changes affect the conditions of a foster home's verification?

(a) Changes that affect the conditions of a foster home's verification include a change in the:

(1) Name of the foster home;

(2) Foster home's address and/or location;

(3) Foster home's capacity, as determined by the capacity requirements in §749.2557 of this title (relating to May a foster agency home exceed its verified capacity?);

(4) Ages and gender(s) of children for which the home is verified;

(5) The types of services the foster home will provide; or

(6) The composition of the family or home.

(b) A verification certificate is only valid for the address and/or location indicated on the verification certificate. A new or temporary verification must be issued prior to a foster home's change in address or location.

§749.2815. How often must I have supervisory visits with the foster home?

(a) You must have supervisory visits:

(1) In the foster home at least quarterly;

(2) With both foster parents, if applicable, at least once every six months; and

(3) With all household members at least once every year.

(b) At least one supervisory visit per year must be unannounced.

(c) You must document each visit in the home's record. The documentation must include specific rules evaluated, results of the evaluation, deficiencies found, plans for achieving compliance, and plans for follow-up to ensure compliance was achieved.

§749.2817. Must I monitor and have supervisory visits with a foster home where no children are placed?

(a) You must maintain all monitoring and supervisory requirements if the home is available for placements.

(b) If you place the home on inactive status, you do not have to monitor the home or have supervisory visits.

§749.2823. Are background checks required on homes that are on inactive status?

Background checks are not required for homes that are on inactive status. If the home is taken off of inactive status and it has been more than two years since the last background check for any person(s) at the home for whom a check is required, the background check(s) must be requested before a child or children can be placed in the home.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. FOSTER HOMES: HEALTH AND SAFETY REQUIREMENTS, ENVIRONMENT, SPACE AND EQUIPMENT
DIVISION 1. HEALTH AND SAFETY

40 TAC §§749.2901, 749.2903, 749.2905, 749.2907, 749.2909, 749.2911, 749.2913, 749.2915, 749.2917

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2903. Who must conduct fire and health inspections at a foster home?

(a) All foster homes are required to obtain fire and health inspections. The requirements related to fire and health inspections are as follows:

(1) You must explore all available resources, city, county, and local governments to determine whether there is any local authority to conduct health and fire inspections. You must document all contacts with the date, name of person contacted, and the person's response to the request to complete an inspection.

(2) If no local authority exists to complete a fire inspection for the home, you must request that the state Fire Marshal's Office to do the inspection. If no local authority exists to complete a health inspection for the home, you must request a health inspection from the Department of State Health Services.

(3) If, after exploring and documenting all efforts to obtain a local or state fire inspection for a home, you cannot obtain a fire inspection, you may use our Fire Prevention Checklist form.

(4) If, after exploring and documenting all efforts to obtain a local or state health inspection for a home, you cannot obtain a health inspection, you may use our Environmental Health Checklist form.

(b) Once you document that there is no entity to conduct a health and/or fire inspection in a particular area, you may use that documentation for any foster home verified by you in that area. A copy of the documentation must be on file in each foster home record to which the documentation applies.

(c) Documentation that there is no entity to complete a health and/or fire inspection in a particular area is valid for one year.

§749.2905. How often must fire and health inspections be conducted at a foster home?

(a) Unless otherwise stated in the report, a fire or health inspection report obtained from a local or state fire or health authority is current for:

(1) One year for a foster group home; and

(2) Two years for a foster family home.

(b) If you use a DFPS checklist for a foster home's fire or health inspection, the checklist is current for one year.

§749.2911. How must smoke detectors be installed and maintained at a foster home?

Smoke detectors must be installed and maintained according to the manufacturer's instructions, or in compliance with the state or local fire inspector's instructions.

§749.2915. Where must a foster home store dangerous tools and equipment?

A foster home must store dangerous tools and equipment, such as hatchets, saws, and axes, so they are inaccessible to children. Children may use these tools and equipment with caregiver supervision, as appropriate based on the child's age, maturity, and treatment issues.

§749.2917. What are the requirements for animals that are present at a foster home?

(a) Caregivers must keep the home and premises free of stray animals.

(b) The foster home must not allow children to play with stray animals or other animals that could be dangerous.

(c) Any animals on the premises of a home must be kept free of disease. Animals must be vaccinated and treated as recommended by a licensed veterinarian. The caregivers must have documentation at the home showing that dogs, cats, and ferrets have been vaccinated as required by Texas Health and Safety Code, Chapter 826. If the foster home chooses to have animals on the premises, it must ensure that the animals do not create health problems or a health risk for children.

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DIVISION 2. TOBACCO USE

40 TAC §749.2931

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The new section implements HRC, §42.042.

§749.2931. What policies must I enforce regarding tobacco products?

(a) A child may not use or possess tobacco products.

(b) Caregivers and other adults may only smoke tobacco products outside.

(c) No one may smoke tobacco products in a motor vehicle while transporting children in care.

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DIVISION 3. WEAPONS, FIREARMS, EXPLOSIVE MATERIALS, AND PROJECTILES

40 TAC §§749.2961, 749.2963, 749.2965, 749.2967

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.2961. Are weapons, firearms, explosive materials, and projectiles permitted in a foster home?

(a) Generally, weapons, firearms, explosive materials, and projectiles (such as darts or arrows), are permitted, however, there are some specific restrictions:

(1) Weapons, firearms, explosive materials, and projectiles are not permitted at a foster home providing treatment services unless one of the foster parents is employed as a law enforcement official;

(2) If you allow weapons, firearms, explosive materials, projectiles, or toys that explode or shoot, you must develop a policy identifying specific precautions to ensure children do not have unsupervised access to them, including locked storage and separate locked storage for the weapons and ammunition;

(3) You must determine it is appropriate for a child receiving only child-care services to use the weapons, firearms, explosive materials, projectiles, or toys that explode or shoot; and

(4) No child may use a weapon, firearm, explosive material, projectile, or toy that explodes or shoots, unless the child is directly supervised by a qualified adult.

(b) Your policies must require foster parents to notify you if there is a change in the type of or an addition to weapons, firearms, explosive materials, or projectiles.

§749.2967. May a caregiver transport a child in a vehicle where firearms, other weapons, explosive materials, or projectiles are present?

(a) A caregiver may not transport a child in a vehicle where a handgun is present, unless the handgun has been issued to the caregiver as part of that person's employment as a law enforcement official.

(b) A caregiver may transport a child in a vehicle where firearms (not handguns), other weapons, explosive materials, or projectiles are present if:

(1) The child is only receiving child-care services;

(2) All firearms are not loaded; and

(3) The firearms, other weapons, explosive materials, or projectiles are inaccessible to the child.

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DIVISION 4. SPACE AND EQUIPMENT

40 TAC §§749.3021, 749.3023, 749.3025, 749.3027, 749.3029, 749.3031, 749.3033, 749.3035, 749.3037, 749.3039, 749.3041

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3021. How much space must bedrooms used by foster children have?

(a) A bedroom must have at least 40 square feet of space for each occupant and no more than four occupants per bedroom are permitted, even if the square footage of the room would accommodate more than four occupants. The four occupants restriction does not apply to children receiving treatment services for primary medical needs.

(b) Single occupant bedrooms must have at least 80 square feet of floor space.

(c) The floor space requirement must not include closets or other alcoves.

(d) Floor space must be space that children can use for daily activities.

(e) If a foster home was verified before January 1, 2007, then a foster home is exempt from the maximum bedroom occupancy requirement until:

(1) The foster family moves to a new home;

(2) The foster home is structurally altered by adding a new room; or

(3) The foster home's verification is no longer valid.

§749.3035. What bathroom accommodations must a home have?

(a) A foster home must have one lavatory, one tub or shower, and one toilet for every eight household members. A foster home verified before January 1, 2007, is exempt from this requirement until it is no longer verified by the agency under which it is currently verified, or it makes structural changes to the home by adding additional bathrooms.

(b) All lavatories, tubs, and showers must have hot and cold running water.

(c) For foster homes that care for primary medical needs children, the child's bedroom and the child's bathroom must be located on the same floor. A foster home verified before January 1, 2007, is exempt from this requirement until it is no longer verified by the agency.

(d) Bathrooms must allow for privacy.

§749.3039. What are the requirements for outdoor recreation space and equipment?

(a) Equipment must not have openings, angles, or protrusions that can entangle a child's clothing or entrap a child's body or body parts.

(b) Equipment must be securely anchored according to manufacturer's specifications to prevent collapsing, tipping, sliding, moving, or overturning.

(c) Climbing equipment, swings, and slides must not be installed over asphalt or concrete.

(d) Equipment must be appropriate, cleaned, maintained, and repaired.

(e) Trampolines may not be used as play or recreational equipment.

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DIVISION 5. NUTRITION AND FOOD PREPARATION

40 TAC §§749.3061, 749.3063, 749.3065, 749.3067, 749.3069, 749.3071, 749.3073, 749.3075, 749.3077, 749.3079, 749.3081

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3061. What are the requirements for feeding children in care?

(a) Caregivers must give children food of adequate quality and in sufficient quantity to supply the nutrients necessary for proper growth and development.

(b) Caregivers must feed an infant whenever the infant is hungry.

(c) Caregivers must provide a toddler or school age child with three meals and at least one snack a day.

(d) No more than 14 hours may pass between the last meal or snack of the day and the availability of the first meal the following day.

§749.3063. What types of food and water must caregivers provide children?

(a) Caregivers must provide a child with food that is:

(1) Of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the United States Department of Agriculture guidelines; and

(2) Appropriate for the child's age and activity level.

(b) Caregivers must not serve a child nutrient concentrates and supplements, such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances in lieu of food to meet the child's daily nutritional need, except with written instructions from a licensed health-care professional.

(c) Caregivers must ensure drinking water is always available to each child and is served in a safe and sanitary manner. Children must be well hydrated and must be encouraged to drink water during physical activity and in warm weather.

§749.3069. May caregivers offer a child in care different food choices than what the family is eating?

(a) A caregiver must offer a child in care the same food choices that other children in the home are offered, unless medically contraindicated for the child.

(b) A caregiver must offer a child in care food choices that are at least comparable to what the adults in the home are eating, unless medically contraindicated for the child.

§749.3073. What are the nutrition requirements for a child with primary medical needs?

(a) Caregivers must feed a child with primary medical needs according to his medical and developmental needs.

(b) A licensed physician must prescribe tube feeding. A dietician or physician must plan the diet that the physician prescribes.

(c) Children must eat in an upright position unless the service planning team's recommendations are to the contrary.

§749.3075. What food service practices must caregivers use for children receiving treatment services for primary medical needs or mental retardation?

(a) Food service practices for children receiving treatment services for primary medical needs or mental retardation, including nonmobile children, must encourage self-help and development.

(b) A toddler or older child must eat or be fed in the dining area, unless the service planning team's recommendations are to the contrary.

(c) Infants must be held during feedings, unless the service planning team's recommendations are to the contrary.

§749.3077. What are the requirements for tube-feeding formula?

(a) A registered or licensed dietician, physician, or a registered nurse must ensure and document that the caregiver that prepares formula is adequately trained and has demonstrated competency in preparing the formula.

(b) Tube-feeding formulas must supply the recommended dietary allowance for each child.

(c) Caregivers must prepare and store the formula:

(1) According to directions; or

(2) As prescribed by a health-care professional.

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DIVISION 6. TRANSPORTATION

40 TAC §§749.3101, 749.3103, 749.3105, 749.3107, 749.3109, 749.3111

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The new sections implement HRC, §42.042.

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DIVISION 7. SWIMMING POOLS, BODIES OF WATER, SAFETY

40 TAC §§749.3131, 749.3133, 749.3135, 749.3137, 749.3139, 749.3141, 749.3143, 749.3145, 749.3147, 749.3149

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§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3133. What are the requirements for a pool at a foster home?

(a) The caregivers must inform children about house rules for use of the pool and appropriate safety precautions. Adult supervision and monitoring of safety features must be adequate to protect children from unsupervised access to the pool.

(b) The swimming pool must be built and maintained according to the standards of the Department of State Health Services and any other applicable state or local regulations.

(c) A fence or wall that is at least four feet high must enclose the pool area. The fence must be well constructed and be installed completely around the pool area. A foster home that you verified before January 1, 2007, has one year from that date to comply with this requirement. Caregivers must continue to prevent children's unsupervised access to the pool.

(d) Fence gates leading to the outdoor pool area must be self-closing and self-latching. Gates must be locked when the pool is not in use. Keys to open the gate must not be accessible to children under the age of 16 years old or children receiving treatment services.

(e) Doors that lead from the home to the pool area must have a lock that only adults or children over 10 years old can reach. The lock must be completely out of the reach of children younger than 10 years old.

(f) Furniture, equipment, or large materials must not be close enough to the pool area for a child to use them to scale the fence or release a lock.

(g) At least two life-saving devices must be available, such as a reach pole, backboard, buoy, or a safety throw bag with a brightly colored buoyant rope or throw line. One additional life-saving device must be available for each 2,000 square feet of water surface, so a pool of 2,000 square feet would require three life saving devices.

(h) Drain grates must be in place, in good repair, and capable of being removed only with tools.

(i) Caregivers must be able to clearly see all parts of the swimming area when supervising activity in the area.

(j) The bottom of the pool must be visible at all times.

(k) Pool covers must be completely removed prior to pool use.

(l) An adult must be present who is able to immediately turn off the pump and filtering system when any child is in the pool.

(m) Pool chemicals and pumps must be inaccessible to all children.

(n) Machinery rooms must be locked to keep children out.

(o) An aboveground pool must:

(1) Have a barrier that prevents a child's access to the pool;

(2) Be inaccessible to children when it is not in use; and

(3) Meet all other pool safety requirements specified in this subchapter.

§749.3137. What are the child/adult ratios for swimming activities?

(a) The maximum number of children one adult can supervise during swimming activities is based on the age of the youngest child in the group and is specified in the following chart:
Figure: 40 TAC §749.3137(a)

(b) In addition to meeting the required swimming child/adult ratio listed in subsection (a) of this section, if four or more children are engaged in swimming activities, then there must be at least two adults to supervise the children.

(c) When a child who is non-ambulatory or who is subject to seizures is engaged in swimming activities, you must assign one adult to that one child. This adult must be in addition to any lifeguard on duty in the swimming area. You do not have to meet this requirement if a licensed physician writes orders in which the physician determines that the child:

(1) Is at low risk of seizures and that special precautions are not needed; or

(2) Only needs to wear an approved life jacket while swimming and additional special precautions are not needed.

(d) A lifeguard who is supervising the area where the children are swimming may be counted in the child/adult ratio.

(e) The ratios in subsection (a) of this section do not include children over the age of 12 years old who are proficient swimmers, however you must still comply with the child/caregiver ratios required in §749.2559 of this title (relating to How do I determine the child/caregiver ratio for a foster family home?) or §749.2563 of this title (relating to How do I determine child/caregiver ratio for a foster group home?).

§749.3145. What are the safety requirements for wading pools?
Wading/splashing pools (less than two feet of water) must be:

(1) Stored out of children's reach, when not in use;

(2) Drained at least daily; and

(3) Stored, so it does not hold water.

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SUBCHAPTER P. FOSTER-ADOPTIVE HOMES AND LEGAL RISK PLACEMENTS
DIVISION 1. VERIFICATION OF FOSTER-ADOPTIVE HOMES

40 TAC §749.3201, §749.3203

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. LEGAL RISK PLACEMENTS

40 TAC §749.3221

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SUBCHAPTER Q. ADOPTION SERVICES: CHILDREN

DIVISION 1. CONSENT

40 TAC §749.3301

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DIVISION 2. ADOPTION SERVICE PLAN

40 TAC §§749.3321, 749.3323, 749.3325, 749.3327

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The new sections implement HRC, §42.042.

§749.3323. What must an adoption service plan include?

(a) The service plan must address:

(1) The needs of the birth parents (unless parental rights have been relinquished or involuntarily terminated), the fetus or child, and the adoptive family; and

(2) Any other issue that impacts the adoption.

(b) The adoptive family becomes part of the service plan when matched with a child, or with a birth parent and fetus. You do not have to develop separate service plans for adoptive families that do not have a completed home study.

(c) The plan must include specific strategies to meet the needs and issues identified, and an estimate of the time required to consummate the adoption. You must inform the birth parents (unless parental rights have been relinquished or involuntarily terminated) and adoptive parents of the services you provide.

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For further information, please call: (512) 438-3437

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DIVISION 3. PREPARATION FOR ADOPTION

40 TAC §§749.3341, 749.3343, 749.3345, 749.3347, 749.3349, 749.3351, 749.3353

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3343. What does preparing a child for adoption include?

(a) You must base your preparation on the child's needs and level of understanding.

(b) Preparation must include helping the child to:

(1) Know and understand his history;

(2) Understand the difference between biological, foster, and adoptive parents;

(3) Express hopes and fears about adoption, including fears of disruption;

(4) Separate from people he is close to, and grieve their loss;

(5) Form new attachments; and

(6) As appropriate, make a plan for contact with siblings, other family members, and/or other significant persons.

(c) You must document preparation activities in the child's record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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DIVISION 4. PLACEMENT REQUIREMENTS

40 TAC §749.3371, §749.3373

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3371. What are the requirements for a child to visit the adoptive family prior to placement?

(a) Except in the case of children one month old and younger, a child must have at least one pre-placement visit with the adoptive family prior to placement. You must base the length, location, and number of visits on the age, development, and needs of the child.

(b) You must schedule these visits over a period of time that ensures that both the child and the adoptive family have adequate time to prepare for the placement. The period of time should be based on the age and developmental needs of the child.

(c) The planning for the pre-placement visits must include the child, if applicable, the foster parents, and the adoptive parents.

(d) You must document the plan for pre-placement visits. Your child placement management staff must approve the plan before visits are initiated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. REQUIRED INFORMATION

40 TAC §§749.3391, 749.3393, 749.3395

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3391. What information must I compile for a child I am considering for adoptive placement?

(a) As part of the Health, Social, Educational, and Genetic History report, you must compile the following information for a child you are considering for adoption placement:
Figure: 40 TAC §749.3391(a)

(b) In addition, you must document the following in the child's record:
Figure: 40 TAC §749.3391(b)

§749.3395. What information must I provide the adoptive parents prior to or at the time of adoptive placement?

(a) The agency must discuss information about the child and his birth parents with the prospective adoptive parents.

(b) According to the Texas Family Code §162.006, you must inform the prospective adoptive parents of their right to examine the records and other information relating to the history of the child.

(c) The written information provided to the prospective adoptive parents must be edited to protect any confidential information.

(d) You must provide the prospective adoptive parents information about the DFPS adoption assistance programs if the family may be eligible for such assistance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. POST-PLACEMENT SUPERVISION

40 TAC §§749.3421, 749.3423, 749.3425, 749.3427, 749.3429, 749.3431

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3425. What are the requirements for post-placement contacts with the adoptive family and child?

(a) You must have face-to-face contacts with the child and adoptive parents, as follows:
Figure: 40 TAC §749.3425(a)

(b) Contacts not in the home may be in your office or another location that allows you enough privacy to counsel with the adoptive family and evaluate the placement.

(c) After the first six months of placement, you must have at least quarterly face-to-face contacts in the adoptive home with the entire adoptive family until the adoption decree is entered.

(d) Contacts must be documented and reviewed by child placement management staff.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 7. POST-ADOPTION SERVICES

40 TAC §§749.3461, 749.3463, 749.3465

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3461. Must I offer counseling services after the adoption is consummated?

(a) You must offer counseling services to the adoptive child and adoptive parents after the adoption is consummated.

(b) You may offer these services through your agency or an outside counseling resource.

§749.3463. If supplemental information concerning birth parents subsequently comes to my attention, what are my responsibilities?

(a) You must make reasonable efforts to inform the adoptive parents and/or an adult adoptee, in writing, about supplemental medical, psychological, or psychiatric information, including developing genetic conditions, terminal illnesses, or death of a birth parent, that subsequently comes to your attention. You must document the information provided, the date and method of providing the information, and the names of the persons receiving the information.

(b) When an adoptive placement is made, you must tell older adopted children and adoptive parents that you will communicate the information in subsection (a) of this section to them provided that they

keep you informed of their whereabouts. You must document when you gave this information to the child and to adoptive parents.

(c) When you receive information on the identified topic, you must, at a minimum:

(1) Write the adoptive parents and/or adult adoptee at the last known address;

(2) If the letter is returned to you as undeliverable, check the telephone directory or Internet search for the city where the adoptive parents and/or adult adoptee were last known to be living;

(3) If this action does not locate the adoptive parents and/or adult adoptee, check the record for contact information on family members or others who may have knowledge of the adoptive parents and/or adult adoptee's whereabouts and attempt to contact these persons and obtain forwarding information; and

(4) Document your attempts to locate the adoptive parents and/or adult adoptee.

§749.3465. What must I do when an adoptee requests his adoption record?

(a) According to Texas Family Code §162.006, you must provide to the adult adoptee a copy of the adoption report that has been edited to protect any confidential information.

(b) If the adoptee is younger than 18 years of age, the request for the information must come from or must include the written consent of the adoptee's adoptive parents or managing conservator.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. ADOPTION SERVICES: BIRTH PARENTS

DIVISION 1. BIRTH PARENT PREPARATION

40 TAC §749.3501, §749.3503

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3501. What information must I provide to birth parents who contact me for services?

(a) Upon establishing a formal relationship with birth parents, you must provide the following information to them in writing:

(1) Alternatives and options to adoption that your policies do not oppose;

(2) The services you provide, including counseling and post-adoption services;

(3) Adoption registries;

(4) Legal rights and responsibilities of both birth parents in regard to:

(A) Relinquishment of parental rights;

(B) Waivers of Interest;

(C) Affidavit of status;

(D) Termination of parental rights;

(E) Designating the father of a child as "unknown" based on legal requirements; and

(F) Paternity registry requirements; and

(5) Any assistance available through the agency to meet housing, medical, and prenatal care and other needs;

(b) You must provide and discuss this information to birth parents in a language that they understand; and

(c) You must document the:

(1) Date the information was shared; and

(2) Agency staff that shared the information.

§749.3503. What are the requirements for contacting birth parents that become my clients?

(a) Child placement staff must have at least:

(1) Two face-to-face contacts with birth parents prior to the relinquishment of parental rights over a period of two or more days. At least one interview must be held after the birth of the child. If face-to-face contact with the birth father is not feasible, you must document justification for contacts that are not face-to-face; and

(2) Except in cases of relinquishment or involuntary termination of parental rights, quarterly contact with birth parents prior to placement of the child.

(b) If the contacts required in subsection (a) of this section cannot be made, you must document that you have exercised reasonable efforts to locate the absent parent, and you must document why the contacts could not be made.

(c) Contacts must assist birth parents to:

(1) Understand their feelings regarding relinquishing the child for adoption;

(2) Understand the long range implications of relinquishing the child for adoption;

(3) Freely make a choice regarding relinquishing the child to the agency for adoption;

(4) Insure that birth parents are not pressured to make a decision to place their child for adoption;

(5) Obtain information from birth parents about their expectations for adoptive placement, if placement is chosen, and the degree and type of involvement, if any, they desire with adoptive family; and

(6) Obtain the required Health, Social, Educational, and Genetic History Report (HSEGH).

(d) The following topics must be discussed with the birth parents:

(1) Preparation for childbirth, when applicable;

(2) Relinquishment or waiver of parental rights;

(3) Termination of parental rights; and

(4) Counseling in regard to separation, loss, and grief issues.

(e) Staff providing the service must document all contacts with birth parents.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. TERMINATION OF PARENTAL RIGHTS

40 TAC §749.3521, §749.3523

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3523. What specific information must I obtain from birth parents that voluntarily relinquish their parental rights?

A parent who signs an affidavit of voluntary relinquishment of parental rights regarding a biological child must also prepare a medical history report form that we issue as required by §161.1031 of the Texas Family Code. If the child is:

(1) In the managing conservatorship of Child Protective Services, DFPS must maintain the form and make it available to persons with whom the child is placed; and

(2) Placed for private adoption through a licensed child-placing agency, that agency must maintain the form.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. POST ADOPTION SERVICES

40 TAC §749.3571, §749.3573

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3573. What are the requirements to provide information about the child to birth parents after the adoption is consummated?

(a) You must make reasonable efforts to inform birth parents, in writing, about developing genetic conditions, terminal illness, or death of the biological child that comes to your attention.

(b) At the time the adoption placement is made, you must tell birth parents that you will communicate the information in subsection (a) of this section to them provided that they keep you informed of their whereabouts.

(c) When you receive information on the identified topics, you must document your attempts to locate the birth parents, the information provided, the date and method of providing the information, and the names of the persons receiving the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER S. ADOPTION SERVICES: ADOPTIVE PARENTS

DIVISION 1. ADOPTIVE APPLICANT PREPARATION

40 TAC §749.3601

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 2. PRE-ADOPTIVE HOME SCREENING

40 TAC §§749.3621, 749.3623, 749.3625, 749.3627, 749.3629, 749.3631, 749.3633

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§749.3621. What is a pre-adoptive home screening?

A pre-adoptive home screening contains documentation of the following:

(1) Interviews with adoption applicants, their families, and collateral contacts as necessary;

(2) Information obtained through review of documents, reports, and inspections;

(3) Assessment of the information obtained to determine whether applicants meet the requirements for approval as adoptive families;

(4) Evaluation of the information obtained in order to make recommendations about the family's capacity for adoption, including the age, number, sex, and special needs of the children the family has the capacity to parent;

(5) Assessment of basic care and safety issues, including safety of the environment of the adoptive home; and

(6) Review and approval by child placement management staff, including the ages and gender(s) of the children for whom the home is approved, the special needs of the children for whom the home is approved, and the approved capacity of the home.

§749.3623. What information must I obtain for the adoptive home screening?

You must obtain, document, and assess the following information about a prospective adoptive home:
Figure: 40 TAC §749.3623

§749.3629. What are the requirements for visiting the home during an adoptive home screening?

(a) Unless the child is already placed in the home for foster care, you must visit the home when all members of the household are present.

(b) You must document in the record the date, persons present, their relationship to the prospective adoptive family, and observations made during the visit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. BASIC CARE AND SAFETY REQUIREMENTS

40 TAC §749.3661, §749.3663

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 4. PRE-PLACEMENT REQUIREMENTS

40 TAC §749.3691, §749.3693

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 5. PRE-ADOPTION CONSUMMATION ACTIVITIES

40 TAC §§749.3721, 749.3725, 749.3727, 749.3729

The new sections are adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

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DIVISION 6. COUNSELING SERVICES

40 TAC §749.3741

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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DIVISION 7. SUBSEQUENT ADOPTIONS

40 TAC §749.3761

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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SUBCHAPTER T. ADDITIONAL REQUIREMENTS FOR CHILD-PLACING AGENCIES THAT PROVIDE AN ASSESSMENT SERVICES PROGRAM

DIVISION 1. REGULATION

40 TAC §749.3801

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042 and §42.0425.

§749.3801. Does Licensing regulate all assessment services?

(a) No. This subchapter only regulates child-placing agencies that also provide an assessment services program.

(b) Services provided by other individuals, agencies, and organizations are not subject to regulation under this subchapter.

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DIVISION 2. ADMISSION

40 TAC §749.3831

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042 and §42.0425.

§749.3831. What are the requirements for approving a child's admission into my assessment services program?

(a) The person responsible for the assessment services program must review and approve in writing the determination that your program will be able to provide or obtain all assessment services the child appears to need at intake.

(b) The review, determination, and approval must be:

(1) In writing, signed, and dated from the person responsible for the assessment services program; and

(2) Completed prior to the admission of the child into your assessment services program.

(c) The determination on the appropriateness of the program to meet the child's assessment needs must be filed in the child's record if the child is admitted into your assessment services program.

(d) You must document in the child's record whether you are:

(1) Only providing assessment services to the child; or

(2) Also providing other services, such as transitional living services.

(e) You must document in the child's record the date of the child's admission into your assessment services program.

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DIVISION 3. PLAN FOR THE ASSESSMENT

40 TAC §§749.3861, 749.3863, 749.3865, 749.3869, 749.3871

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The new sections implement HRC, §42.042 and §42.0425.

§749.3861. When must I complete the child's individual plan for the assessment?

(a) You must complete the child's individual plan for the assessment within 10 days from the date of the child's admission into the program.

(b) You must document the plan in the child's record.

§749.3865. What must an individual plan for the assessment include?

(a) An individual plan for the assessment must include:

(1) Time frames for providing all assessment services;

(2) Recommendations for the child's care during the assessment process;

(3) Any treatment to be provided during the assessment period; and

(4) Current data from the caregiver's evaluation of the child's behavior and level of functioning.

(b) The common application is not and must not serve as the individual plan for the assessment.

§749.3869. How must my assessment services program collect information from a child's caregivers?

(a) Your assessment services program must systematically collect information from caregivers throughout the child's participation in the assessment services program. This information includes the caregivers' observations and opinions of the child.

(b) You must document this information in the child's record. Your documentation must include your consideration of the caregivers' observations and opinions.

§749.3871. When is the plan for the assessment complete?

(a) The plan for the assessment is complete when it contains the necessary information and the signed approval of the person responsible for the assessment services program or a designated employee who meets the qualifications of a person responsible for the assessment program.

(b) The parent must review and be provided a copy of the plan for the assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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DIVISION 4. ASSESSMENT REPORT

40 TAC §§749.3891, 749.3893, 749.3895, 749.3897

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042 and §42.0425.

§749.3897. Who must review and approve an assessment report?

(a) The following people must review the assessment report:

(1) The person responsible for the assessment program or a designated employee who meets the qualifications of a person responsible for the assessment program;

(2) The child's primary caregiver; and

(3) The child's parent.

(b) The person responsible for the assessment program, or the designated qualified employee, must approve and sign the report.

(c) You must file the original, approved and signed assessment report, including any addendums to the report, in the child's record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 750. INDEPENDENT FOSTER HOMES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new Chapter 750, Independent Foster Homes. New §§750.5, 750.43, 750.101, 750.105, 750.121, 750.123, 750.133, 750.151, 750.153, 750.157, 750.159, 750.161, 750.169, 750.171, 750.201, 750.237, 750.243, 750.301, 750.373, 740.451, 750.453, 750.455, 750.1009, and 750.1201 are adopted with changes to the proposed text published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 2119). New §§750.1, 750.3, 750.41, 750.61, 750.103, 750.107, 750.131, 750.155, 750.163, 750.165, 750.167, 750.181, 750.183, 750.185, 750.231, 750.233, 750.235, 750.239, 750.241, 750.245, 750.331, 750.333, 750.351, 750.353, 750.355, 750.371, 750.401, 750.403, 750.501, 750.601, 750.701, 750.801, 750.901, 750.1001, 750.1003, 750.1005, 750.1007, and 750.1101 are adopted without changes to the proposed text and will not be republished.

DFPS is required by Chapter 42 of the Human Resources Code to periodically review all minimum standard rules. In addition, part of the Child Care Licensing Division's (Licensing) business plan is to review, analyze, and update Licensing rules to strengthen the protection of children in out-of-home care and improve an operator's understanding of the rules. In this issue of the *Texas Register*, DFPS is repealing Chapter 720, 24-Hour Care Licensing, and replacing it with three new chapters, one of which is Chapter 750, Independent Foster Homes.

The existing minimum standards for independent foster homes in Chapter 720 are outdated. The standards have not been revised since 1985. The current standards are divided according to the type of home where care is provided, e.g. therapeutic foster home, habilitative foster home, etc. The proposed rules will consolidate the minimum standards for all these homes into a cohesive set of rules that are designed to focus on the needs of the children in care. Many of the changes are due to this consolidation.

In order to update the minimum standards, information has been obtained from providers and provider associations, Child Protective Services, and Licensing staff. Updates have also been made based on the review of available research and literature relating to the child development field, best practices in child placement, and health and safety practices recommended by experts such as the Consumer Product Safety Commission, American Academy of Pediatrics, and the Texas Department of State Health Services.

The rules will also facilitate an understanding of the law and Licensing requirements and are written using "plain language" techniques with a question and answer format. Rules that are easy to read and understand will result in higher rates of compliance.

The sections will function by reducing the risk of harm to children and improving quality of care due to updating standards on current knowledge and practices. In addition, the standards will be easier to understand, which should encourage voluntary compliance and reduce noncompliance caused by misinterpretation of the rules.

The DFPS Council considered public testimony concerning these rules at the meetings held January 6, 2006 and April 7, 2006. Public meetings were held September 22, 2005, October 24, 2005, and March 23, 2006, to receive comment.

During the public comment period, DFPS received comments from Crisis Prevention Institute, Inc. Concerning §750.159, the commenter supported the rule and suggested broadening the scope of evaluations of caregivers qualified in behavior intervention to include an evaluation of their understanding of all risks involved in emergency behavior interventions, not just risks associated with prone restraints. In order to clarify training and caregiver qualification requirements, DFPS is deleting the reference to evaluations of risks associated with prone and supine restraints in paragraph (3), because these training requirements are specifically addressed in §750.401 along with other required emergency behavior intervention training content.

In addition to the change resulting from comments, DFPS is adopting the following rules with changes:

§750.43. What do certain words and terms mean in this chapter? DFPS is adopting the definitions of foster family home and foster group home to delete the age limits from these definitions, changing "children up to the age of 18 years old" to "children or young adults."

§750.101. What are my responsibilities as the permit holder before I begin operating? The paragraphs that require documentation that must be submitted with an application for a license are moved to §745.243, which lists other information that must be submitted with an application for a license.

§750.105. What responsibilities do I have for personnel policies and procedures? DFPS is deleting a reporting requirement that is already addressed in a rule specific to serious incidents.

§750.121. What are the specific responsibilities of the governing body? DFPS is deleting the reference to Chapter 43 of the Human Resources because it does not apply to independent foster homes.

§750.123. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it? DFPS is revising from 15 days to 2 days the required time frame in this rule for notifying Licensing of a change in the composition of the governing body. The change makes this rule consistent with requirements in Chapter 745.

§750.133. What are my specific fiscal requirements? DFPS is adopting this section with a change to allow the operation up to 30 days after discharge to give/send the child his money.

§750.151. What are the general requirements for my home's policies? A subsection is added to clarify which policies are affected by this rule. A subsection is deleted because it repeats a requirement from another rule.

§750.153. What are the requirements for my admission policies? DFPS is revising the rule to make it consistent with new treatment services terms.

§750.157. What child-care policies must I develop? DFPS is adopting this rule with changes. DFPS is deleting the reference to toddlers in paragraph (7)(C), so only the discipline of infants is prohibited. Paragraph (11) is being clarified; you must develop policies regarding program expectations and rules "that apply to all children." The home is not prevented from having separate, additional rules for specific children. DFPS is clarifying in paragraph (6) that a home that does not allow emergency behavior interventions must still have a policy disallowing their use. DFPS is adding a policy requirement from other rules of this Chapter relating to weapons at the home, see paragraph (18).

§750.161. What policies must I develop on the discipline of children in foster care? DFPS is deleting the reference to toddlers, so that only discipline of infants is prohibited.

§750.171. What policies must I develop if I use volunteers? DFPS is adding that volunteer policies must address visitation with children in care, which is in current minimum standards.

§750.237. What information must an active child record include? DFPS is adopting this rule with changes to add "chronic health conditions" as information required to be clearly visible on and/or in the child's record, per current minimum standards, and changing the "signature" of employees making entries into the record to "name" in order to accommodate electronic record keeping.

§750.243. Who must consent to the release of a child's record? DFPS is adopting this rule with the addition that records must be released "as required by law."

§750.453. What right does a child have regarding contact with a parent? DFPS is adopting this rule with changes. Documentation of any plans for child/parent contact is required in the child's record rather than in the service plan. The monthly re-evaluation of contact restrictions is clarified so that it only applies to restrictions imposed by the foster home.

§750.455. What right to privacy does a child have with respect to his contact with others? This section is adopted with changes to clarify that foster parents can assist children with using the phone or with reading/writing correspondence as needed, and "monitoring calls" has been changed to say, "listening to and screening calls."

In addition, DFPS is making minor editorial changes to the following rules: §§750.5, 750.169, 750.201, 750.301, 750.373, 750.451, 750.1009, and 750.1201.

SUBCHAPTER A. PURPOSE AND SCOPE

40 TAC §§750.1, 750.3, 750.5

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.5. How must I interpret the different terminology used in the requirements of Chapter 749 of this title (relating to Child-Placing Agencies)?

(a) The rules of this chapter require you to comply with certain requirements of Chapter 749 of this title. The language of Chapter 749:

(1) Addresses child-placing agencies or the homes that the agencies verify, including foster homes, foster family homes, and foster group homes. For the purposes of this chapter, you must substitute the terminology of Chapter 749 as follows:
Figure: 40 TAC §750.5(a)(1)

(2) In some instances, Chapter 749 rules require action, review, or approval by child placement staff or child placement management staff. For the purposes of this chapter, those actions, reviews, or approvals must be completed by the service planning team. In other words, you must substitute "service planning team" for "child placement staff" or "child placement management staff".

(b) If you must comply with a requirement in Chapter 749 of this title that has an exemption, this exemption applies to you. If, as written in Chapter 749, an applicable exemption is contingent on the date that a child-placing agency verified the home, this exemption applies to you contingent on whether we licensed you by that date. Any other condition of the exemption would apply to you as written.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DEFINITIONS AND SERVICES

DIVISION 1. DEFINITIONS

40 TAC §750.41, §750.43

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.43. What do certain words and terms mean in this chapter?
The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?) and §749.43 of this title (relating to What do certain words and terms mean in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. The following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) Foster family home--A single independent home that is the primary residence of the foster parents and provides care for six or fewer children or young adults.

(2) Foster group home--A single independent home licensed:

(A) After January 1, 2007, that is the primary residence of the foster parent(s) and provides care for seven to 12 children or young adults; or

(B) Prior to January 1, 2007, that provides care for seven to 12 children or young adults.

(3) Foster home--As referred to in this subchapter means both types of homes, foster family homes and foster group homes.

(4) Foster parent--A person who provides foster care services in the foster home.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. SERVICES

40 TAC §750.61

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION

DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §§750.101, 750.103, 750.105, 750.107

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.101. What are my responsibilities as the permit holder before I begin operating?

Before you begin operating, you are responsible for:

(1) Ensuring that your home is legally established to operate within Texas and complying with all applicable statutes;

(2) Establishing the governing body of your home;

(3) Having a governing body that is responsible for, and has authority over, your home's policies and activities;

(4) Having policies that clearly state the responsibilities of the governing body;

(5) Developing operational policies and procedures that comply with or exceed the rules specified in this chapter, Chapter 42 of the Human Resources Code, Chapter 745 of this title (relating to Licensing), and other applicable laws;

(6) Developing and providing us your plan for ensuring that:

(A) We are continually informed of any changes in the location of all records, and any changes in your personnel and professional employees; and

(B) You and your employees contact Statewide Intake (SWI) to report serious incidents and allegations of abuse and neglect.

§750.105. What responsibilities do I have for personnel policies and procedures?

You must:

(1) Develop a written organizational chart showing the administrative, professional, and staffing structures and lines of authority;

(2) Develop written job descriptions, including minimum qualifications and job responsibilities for each position;

(3) Develop written policies on the training requirements for caregivers and employees;

(4) Ensure that personnel policies comply with personnel requirements outlined in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(5) Report or ensure your employees and caregivers report suspected abuse, neglect, or exploitation as required by the Texas Family Code, §261.401;

(6) Ensure that all employees and consulting, contracting, and volunteer professionals who work with a child and others with access to information about a child are informed in writing of their responsibility to maintain child confidentiality; and

(7) Either adopt the model drug testing policy or have a written drug testing policy that meets or exceeds the criteria in the model policy provided in §745.4151 of this title (relating to What drug testing policy must my residential child-care operation have?).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. GOVERNING BODY

40 TAC §750.121, §750.123

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.121. What are the specific responsibilities of the governing body?

The governing body is responsible for:

(1) Ensuring the home remains fiscally sound;

(2) Overseeing and ensuring the management of the home's services and programs in compliance with your policies;

(3) Approving and having authority over the operational policies and activities which must comply with rules of this chapter;

(4) Complying with the law, including Chapter 42 of the Human Resources Code, the applicable rules of this chapter, and other applicable rules in the Texas Administrative Code; and

(5) Carrying out the governing body responsibilities assigned in the foster home's policies and procedures.

§750.123. After a permit has been issued, what subsequent information regarding my governing body must I provide to Licensing, and when must I provide it?

You must provide to us in writing any change in:
Figure: 40 TAC §750.123

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. FISCAL REQUIREMENTS

40 TAC §750.131, §750.133

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.133. What are my specific fiscal requirements?

You must:

(1) Submit documentation to us of a 12-month budget of income and expenses with the application for a new permit;

(2) Submit documentation to us of reserve funds or available credit at least equal to operating costs for the first three months of operation with the application for a new permit;

(3) Have predictable funds sufficient for the first year of operation;

(4) Demonstrate at all times that you have or will have sufficient funds to provide appropriate services for all children in your care; and

(5) Account for a child's money separately from your foster home funds. No child's personal earnings, allowances, or gifts may be used to pay for the child's room and board, unless such a use is a part of the child's service plan and the child's parent approves it in writing. You must give or send the child's money to the child, parent, or next placement within 30 days of the child's discharge.

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DIVISION 4. FOSTER HOME POLICIES

40 TAC §§750.151, 750.153, 750.155, 750.157, 750.159, 750.161, 750.163, 750.165, 750.167, 750.169, 750.171

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.151. What are the general requirements for my home's policies?

(a) The requirements for policies only apply to the operation's policies that are required or governed by this chapter.

(b) The policies that we require must be written and they must indicate the approval of the governing body, date of approval, and effective date.

(c) The policies must be clearly stated and comply with the rules of this chapter.

(d) All employees and caregivers must be made aware of and follow your home's policies and procedures. A copy of your home's policies and procedures must be maintained at the foster home and available for review by an employee or a caregiver.

(e) All policies must be available for review by our staff and your clients, upon request.

(f) You must report any significant changes to the policies to us at least seven days before implementing the change.

(g) You must maintain copies of all current and previous policies for at least two years.

§750.153. What are the requirements for my admission policies?

(a) Your admission policies must:

(1) Describe the age range, gender, and types of treatment services you provide; and

(2) Indicate whether you will admit children on an emergency basis.

(b) You may not accept children unless you can document at admission that there is no conflict in the care of all children in the home.

(c) If you provide treatment services, you must have admission policies describing the emotional disorders, mental retardation, pervasive developmental disorders, or primary medical needs that your program is designed to treat.

(d) If a change in your admission policies will result in a change to the conditions on your permit, you must obtain approval from us before implementing the change.

§750.157. What child-care policies must I develop?

Your must develop policies that describe:

(1) Visitation rights between the child and family members and the child and friends;

(2) The child's rights to correspond by mail with family members and friends, including any policies regarding mail restrictions and receipt of electronic mail;

(3) The child's rights to correspond by telephone with family members and friends;

(4) The child's rights to receive and give gifts to family, friends, staff or caregivers, or other children in care, including any restrictions on gifts;

(5) Personal possessions a child is or is not allowed to have;

(6) Emergency behavior intervention techniques if the use of emergency behavior intervention is permitted in your operation. If its use is not permitted, you must have a policy disallowing its use;

(7) Discipline policies including techniques and methods for ensuring the appropriateness of discipline techniques used with a child. These policies and procedures must:

(A) Guide employees and caregivers in methods used for discipline of a child in care;

(B) Include measures for positive responses to appropriate behavior;

(C) Make clear that discipline of any type is inappropriate and not permitted for infants; and

(D) Emphasize the importance of nurturing behavior, stimulation, and promptly meeting the child's needs;

(8) Any religious program or activity that you offer, including whether children are required to participate in religious activities with caregivers or staff;

(9) The plans for meeting the educational needs of each child;

(10) When trips with caregivers away from the home are allowed and what protocols will be used;

(11) Program expectations and rules that apply to all children;

(12) Child grievance procedures;

(13) The types and frequency of reports to parents;

(14) Procedures for routine and emergency diagnosis and treatment of medical and dental problems;

(15) Routine health care relating to pregnancy and childbirth, if you admit and/or care for a pregnant child;

(16) Your plan for providing health-care services to a child with primary medical needs;

(17) Transitional living policies, if applicable; and

(18) If applicable, the policy required by §749.2961(a)(2) of this title (relating to Are weapons, firearms, explosive materials, and projectiles permitted in a foster home?).

§750.159. What emergency behavior intervention policies must I develop if the use of emergency behavior intervention is permitted in my home?

At a minimum, you must develop emergency behavior intervention policies to implement the requirements in Subchapter L of this chapter (relating to Emergency Behavior Intervention). The policies must include the following:

(1) A complete description of emergency behavior interventions that you permit caregivers to use;

(2) The specific techniques that caregivers can use;

(3) The qualifications for caregivers who assume the responsibility for emergency behavior intervention implementation, including required experience and training, and an evaluation component for determining when a specific caregiver meets the requirements of a caregiver qualified in emergency behavior intervention. You must have an on-going program to evaluate caregivers qualified in emergency behavior intervention and the use of emergency behavior interventions;

(4) Your requirements for and restrictions on the use of permitted emergency behavior interventions;

(5) How you will meet the following requirements:

(A) During admission, explain and document the following to a child in a manner that the child can understand:

(i) Who can use an emergency behavior intervention;

(ii) The actions a caregiver must first attempt to defuse the situation and avoid the use of emergency behavior intervention;

(iii) The situations in which emergency behavior intervention may be used;

(iv) The types of emergency behavior intervention you authorize;

(v) When the use of an emergency behavior intervention must cease;

(vi) What action the child must exhibit to be released from the emergency behavior intervention;

(vii) The way to report an inappropriate emergency behavior intervention;

(viii) The way to provide voluntary comments on any emergency behavior intervention; and

(ix) The process for making comments on any emergency behavior intervention, such as comments regarding the incident that led to the emergency behavior intervention, the manner in which a caregiver intervened, and the manner in which the child was the subject or to which they were a witness. You may create a standardized

form that is easily accessible or give children the permission to submit comments on regular paper; and

(B) At admission, requirements for obtaining each child's input on preferred de-escalation techniques that caregivers can use to assist the child in the de-escalation process, and revisiting this information with the child and caregivers during each post emergency behavior intervention discussion;

(6) Requirement that caregivers must attempt less restrictive and less intrusive emergency behavior interventions as preventive measures and de-escalating interventions to avoid the need for the use of emergency behavior intervention;

(7) Training for emergency behavior intervention. The policy must include a description of the emergency behavior intervention training curriculum that meets the requirements in the rules of this chapter, the amount and type of training required for different levels of caregivers (if applicable), training content, and how the training will be delivered; and

(8) Prohibitions for discharging or otherwise retaliating against:

(A) An employee, client, resident, or other person for filing a complaint, presenting a grievance, or otherwise providing in good faith information relating to the misuse of emergency behavior intervention at the agency or foster home; or

(B) A client or resident because someone on behalf of the client or resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of emergency behavior intervention at the agency or foster home.

§750.161. What policies must I develop on the discipline of children in foster care?

You must develop policies that guide caregivers in methods used for discipline of children in foster care and include:

(1) Measures for positive responses to appropriate behavior;

(2) If you work with infants, a statement that discipline of any type is not appropriate or permitted for infants; and

(3) The importance of nurturing behavior, stimulation, and promptly meeting the child's needs.

§750.169. What policies must I develop for babysitters and respite child-care in my foster home?

You must develop policies for babysitters and respite child-care which include:

(1) Minimum age for care providers;

(2) Minimum amount and type of prior child-care experience that a provider must have;

(3) Amount and type of training a provider must have;

(4) Reference and background information that you must obtain before using the provider;

(5) Amount of time a provider can care for children;

(6) Number of children that a provider can care for;

(7) Information that you must share with a provider, including information about the children in care and emergency contact information;

(8) Specific care instructions that you must share with a provider for children with treatment needs;

(9) A method for contact between you and the provider during the time of the provider's care; and

(10) A requirement that documentation of the provider restrictions and arrangements will be in your records.

§750.171. What policies must I develop if I use volunteers?

If you use volunteers, you must develop policies that:

(1) Include volunteer job descriptions and/or responsibilities;

(2) Address volunteer qualifications, screening and selection procedures, and orientation and training programs;

(3) Address supervision of volunteers; and

(4) Address visitation with children in care.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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DIVISION 5. CLIENTS AND APPEALS

40 TAC §§750.181, 750.183, 750.185

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. REPORTS AND RECORD KEEPING

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES; OPERATIONS RECORDS; AND PERSONNEL RECORDS

40 TAC §750.201

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§750.201. What are the requirements for reports and record keeping?

You must comply with:

(1) Division 1, Subchapter D of Chapter 749 of this title (relating to Reporting Serious Incidents and Other Occurrences);

(2) Division 2, Subchapter D of Chapter 749 of this title (relating to Operation Records); and

(3) Division 3, Subchapter D of Chapter 749 of this title (relating to Personnel Records).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. CLIENT RECORDS

40 TAC §§750.231, 750.233, 750.235, 750.237, 750.239, 750.241, 750.243, 750.245

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.237. What information must an active child record include?

For each child, the active record must include:

(1) The child's full name and another method of identifying the child, such as a client number;

(2) Documentation of known allergies and chronic health conditions on the exterior of the child's record or in another location where the information is clearly visible to persons with access to the record; and

(3) The date of each data entry and the name of the person who makes the data entry.

§750.243. Who must consent to the release of a child's record?

Unless you are releasing information to a parent, to us, or as required by law, you may not release any portion of a child's record to any agency, organization, or individual without the written consent of the person legally authorized to consent to the release.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. FOSTER HOME STAFF AND CAREGIVERS

DIVISION 1. GENERAL REQUIREMENTS

40 TAC §750.301

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§750.301. What are the general requirements for foster home staff and caregivers?

You must comply with Division 1, Subchapter E of Chapter 749 of this title (relating to General Requirements).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. EXECUTIVE DIRECTOR

40 TAC §750.331, §750.333

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. TREATMENT DIRECTOR

40 TAC §§750.351, 750.353, 750.355

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. TREATMENT SERVICES PROVIDED BY NURSING PROFESSIONALS; CONTRACT STAFF AND VOLUNTEERS

40 TAC §750.371, §750.373

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.373. What are the requirements for contract staff, volunteers, and student interns?

You must comply with Division 6, Subchapter E of Chapter 749 of this title (relating to Contract Staff and Volunteers).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT

40 TAC §750.401, §750.403

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. CHILDREN'S RIGHTS

40 TAC §§750.451, 750.453, 750.455

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.451. What are the requirements regarding children's rights?

You must comply with:

(1) Subchapter G of Chapter 749 of this title (relating to Children's Rights), with the exception of:

(A) §749.1009 of this title (relating to What right does a child have regarding contact with a parent?); and

(B) §749.1013 of this title (relating to What right to privacy does a child have with respect to his contact with others?); and

(2) §750.453 of this title (relating to What right does a child have regarding contact with a parent?), and §750.455 of this title (relating to What right to privacy does a child have with respect to his contact with others?).

§750.453. What right does a child have regarding contact with a parent?

(a) You must allow contact between a child and his parent whose parental rights have not been terminated according to:

(1) Your policies; and

(2) The provisions of a court order or any visitation agreement.

(b) You must document in the child's record:

(1) Any plans for contact between the child and a parent; and

(2) Any decision to limit contact with a parent.

(c) Before you can temporarily restrict ongoing contacts or communication between the child and a parent, you must:

(1) Explain the reasons for the restrictions to the child and the child's parent; and

(2) Document the reasons in the child's record.

(d) Restrictions imposed by you that continue more than 30 days must be re-evaluated monthly by the child's service planning team, who also must:

(1) Explain the reasons for the continued restrictions to the child and the child's parents; and

(2) Document the reasons in the child's record.

(e) If you limit communications or visits with a parent for practical reasons, such as geographical distance or expense, you must discuss the limits with the child and the child's parents. You must document the limits in the child's record.

§750.455. What right to privacy does a child have with respect to his contact with others?

(a) Except as determined by the child's service planning team or the child's parent, you may not:

(1) Open or read the child's incoming or outgoing mail, including electronic mail, unless necessary to assist the child with reading or writing; or

(2) Monitor the child's telephone calls unless the child needs assistance with using the telephone.

(b) You must document in the child's record:

(1) Any reason for restricting the child's mail or telephone calls; and

(2) A listing of the mail or telephone calls that you restrict.

(c) You must inform the child and parent about restrictions that you place on the child.

(d) Restrictions that continue for more than 30 days must be re-evaluated monthly by the child's service planning team, who also must:

(1) Explain the reasons for the continued restrictions to the child; and

(2) Document the reasons in the child's record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. ADMISSION

40 TAC §750.501

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of

services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. SERVICE PLANNING, AND DISCHARGE

40 TAC §750.601

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. MEDICAL AND DENTAL

40 TAC §750.701

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER K. DAILY CARE, PROBLEM MANAGEMENT

40 TAC §750.801

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. EMERGENCY BEHAVIOR INTERVENTION

40 TAC §750.901

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

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SUBCHAPTER M. CAPACITY AND CHILD/CAREGIVER RATIO; SUPERVISION; RESPITE CHILD-CARE SERVICES; AND FOSTER FAMILY RELATIONSHIPS

40 TAC §§750.1001, 750.1003, 750.1005, 750.1007, 750.1009

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, §42.042.

§750.1009. When must you notify Licensing of changes that affect the foster home?

You must notify Licensing of any of the following changes as follows: Figure: 40 TAC §750.1009

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. HEALTH AND SAFETY REQUIREMENTS, ENVIRONMENT, SPACE AND EQUIPMENT

40 TAC §750.1101

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. ASSESSMENT SERVICES

40 TAC §750.1201

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC, §42.042.

§750.1201. What are the requirements to provide an assessment services program?

You must comply with Subchapter T of Chapter 749 of this title (relating to Additional Requirements for Child-Placing Agencies That Provide an Assessment Services Program).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER G. INTERNATIONAL BRIDGES

43 TAC §§15.70 - 15.76

The Texas Department of Transportation (department) adopts amendments to §§15.70 - 15.76, concerning international bridges. The amendments to §15.73 and §15.75 are adopted with changes to the proposed text as published in the June 9, 2006, issue of the *Texas Register* (31 TexReg 4722). The amendments to §§15.70 - 15.72, 15.74 and 15.76 are adopted without changes to the proposed text as published in the June 9, 2006, issue of the *Texas Register* (31 TexReg 4722) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The adopted amendments are necessary to implement the provisions of House Bill 1653, 78th Legislature, Regular Session, 2003; add, revise or eliminate certain terms and definitions; update statutory references; clarify existing information; modify requirements for public involvement; and allow for a comparison of competing applications.

No public comments were received regarding the proposed amendments. However, the department made minor modifications to the language of proposed §15.73(3)(A) to further clarify when environmental approvals must be obtained and to eliminate confusion related to the coordination of the environmental process. In addition, the language of proposed §15.75(a)(1)(F) was modified to add the Texas Parks and Wildlife Department to the list of agencies from which the department will solicit comments regarding the application.

The amendments to §15.70 incorporate a new provision enacted by House Bill 1653, which amended Transportation Code, §201.612, to permit an entity that is authorized to construct a new international bridge to enter into the approval process with the Texas Transportation Commission (commission) and the United States simultaneously. This represents a change from the existing process whereby an applicant obtained commission approval prior to requesting approval from the United States. Section 15.70 is further amended to update relevant statutory references.

Section 15.71 is amended to add the definitions of a competing bridge applicant and a district office, change the term "study sector" to "study area," and remove the definition of the Texas-Mexico Toll Bridge Study. The definition of competing bridge applicant is necessary to address the situation where two or more entities may be interested in constructing a new international bridge in the same area. The definition of district office is necessary to properly identify the specific location where applicants may obtain information. In this section, and throughout the amended rules, the term "study sector" is being replaced by the term "study area" in order to bring the application process up to current transportation planning analysis methods. Similarly, the definition of, and all references to, the Texas-Mexico Toll Bridge Study (Study) are being removed because it is no longer used as a basis for analyzing international bridges.

The first sentence of §15.72 is being removed as it is duplicative of a statement found in §15.70. The amendments to this section also include additional language to assist potential applicants with information-gathering related to the application process by directing them to their local department district office and the Transportation Planning and Programming Division.

The amendments to §15.73 set forth the process for addressing competing applications, clarify the requirements related to environmental documentation and public involvement, establish new guidelines for notification of public officials, and remove all references to the Study and sector as previously described.

Section 15.73(3)(A) is amended to clarify that an applicant must comply with the department's administrative rules pertaining to Environmental Policy and must obtain all environmental approvals required for the project prior to submission of the application. The amendments also instruct the applicant to coordinate with the U.S. Department of State and the department regarding the form and content of the environmental document. These changes are necessary to address confusion regarding the type of environmental documentation that is required for international bridge projects and to ensure consistency in the environmental review process.

Section 15.73(3)(B) has been amended to align the public involvement requirements related to international bridge applications with the public involvement requirements found in the department's administrative rules pertaining to Environmental Policy. This change is necessary to address confusion regarding the public involvement process and to ensure that members of the public, competing bridge applicants, and local officials have adequate notice of the hearing or meeting and an opportunity to comment on the proposed project or provide information as appropriate.

In addition, the amendments to paragraph (3)(B) of §15.73 set forth the information that an applicant must include in the notices of public hearings and meetings. Specifically, new paragraph (3)(B)(i) requires a statement that the applicant intends to submit an international bridge application to the commission. New paragraph (3)(B)(ii) requires a description of the project, including design and location information. New paragraph (3)(B)(iii) requires an instruction to competing bridge applicants that they have 60 days from the date the notice is published to provide the

applicant with design, financial, and social and environmental information on the competing project.

New §15.73(3)(C) requires the applicant to send a copy of the notice described in §15.73(3)(B) to the county judges and city mayors within a certain geographic area.

New §15.73(4) is added to set forth the procedures to be followed when two or more applicants compete for approval of the construction of a new international bridge in the same study area. The amendments require an applicant to address the impact of competing projects and demonstrate how its submittal is superior to the other projects.

New §15.73(4)(A) describes the method by which the applicant will provide an analysis of its project compared against competing projects. The amendments require the applicant to analyze its project as a stand-alone project and then analyze its project against competing projects, demonstrating the superiority of one project by comparing the impacts on cost benefits, project viability, design, and social and environmental impacts.

Finally, new §15.73(4)(B) provides that the applicant will not be required to analyze a competing project if the competing bridge applicant does not provide data to the applicant necessary to perform the analysis on a competing project.

Appendix A, which describes the Texas Mexico border sectors identified in the Study, has been deleted since the Study is no longer used as a basis for analyzing international bridges. The amendment to §15.74 removes a reference to an organizational position no longer used by the department.

The amendments to §15.75 eliminate references to obsolete state agency titles, and the section is revised to reflect current titles. In addition, the Texas Parks and Wildlife Department has been added to the list of agencies from which the department will solicit comments regarding the application. New subsection (b)(4) of §15.75 is added to clarify that the commission, as part of its analysis of the application, will consider information pertaining to competing bridges, information timely submitted by competing bridge applicants as well as any other information provided by the department.

In §15.76, all references to the Study and sector are being removed as previously described. New subsection (e)(3) of §15.76 is added to reflect language in Transportation Code, §201.612, and provides that applications not approved by the commission must be withdrawn from consideration for approval by the United States.

COMMENTS

No comments on the proposed rules were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.612, which authorizes the commission to adopt rules to administer that section.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.612.

§15.73. Preliminary Studies.

Prior to submitting an application to the department for the approval of a project, an applicant shall conduct a study of the design, financial feasibility, and social and environmental impact of the project, including the effect of any competing applications.

(1) Design. The applicant shall provide a preliminary design geometric layout certified by a registered professional engineer to be in accordance with standards and criteria from appropriate design manuals applicable at the date of application. The layout must identify:

(A) horizontal and vertical alignments and cross-slope data of the proposed structure showing overall structure length, width, spans, span length, and type of construction, along with dimensions, where applicable, of:

(i) lane width;

(ii) curb width;

(iii) sidewalks;

(iv) shoulder width;

(v) calculated minimum vertical clearance over other roadways and waterways; and

(vi) toll booths and miscellaneous appurtenances;

(B) geometric termini locations along with inspection stations and queue lanes where applicable;

(C) the location and preliminary layout of approach roadways and intersections on both sides of the border with changes necessitated by the project to existing facilities on both sides of the border; and

(D) the location and layout of any other accommodation of buildings or appurtenances deemed necessary by the applicant and any law or regulation governing the operation and maintenance of port of entry operations.

(2) Financial feasibility study. An applicant shall conduct a feasibility study to determine the financial viability of the project. The study shall include the following information.

(A) A financial overview of the project, which shall include:

(i) summary cost estimates for the planning, design, construction, operation, and maintenance of the project; and

(ii) a statement of all financing requirements for the project and sources of all financing.

(B) A project construction schedule identifying the timing, amount, and source of all cash required to pay for all construction costs.

(C) An analysis of the expected financing period of the project, such period to be the greater of 10 years or the time taken to fully pay any and all liabilities incurred for the planning, design, construction, operation, and maintenance of the project plus the time taken to fully pay any and all liability refunding, renegotiations, conversions, and extensions.

(i) An applicant that issues or contemplates issuing any form of liability with a term longer than one year within three years of the date of application shall consider a portion of that liability as incurred for the planning, design, construction, operation, and maintenance of the project unless the applicant demonstrates otherwise to the satisfaction of the commission in the financial feasibility study. A liability not less than the cost of construction and not more than the costs of planning, design, and construction shall be considered in the financial feasibility study as if it had been incurred directly for the project.

(ii) The term of any liability amount determined in clause (i) of this subparagraph shall be the longest term of any liabilities issued or contemplated by the applicant within three years of the application date plus the time taken to fully pay any and all liability refundings, renegotiations, conversions, and extensions.

(D) A detailed analysis of costs over the expected financing period of the project, which shall include:

(i) costs of operations by reasonable expense categories for each year; and

(ii) costs of maintenance for each year, such costs identifying each major system, structure, and component of the project that is subject to wear or deterioration, and the analysis of such costs stating both the cost and the expected frequency of inspection, repair, renewal, rehabilitation, and/or replacement required to keep the project in like-new condition.

(E) A pro forma analysis based on cash basis accounting for each year of planning, design, construction, and the expected financing period of the project showing:

(i) anticipated cash receipts, sources of cash receipts, and rates charged to achieve those cash receipts;

(ii) anticipated cash disbursements;

(iii) anticipated cash balances;

(iv) cash used to meet the requirements of any bond sinking fund and loan or liability amortization payment.

(F) A description of the methods used in preparing the financial feasibility study, the assumptions contained in the study, and persons and entities responsible for the preparation of the study.

(G) An analysis of the need for the project and potential impact on traffic congestion and mobility, and:

(i) average annual daily traffic (AADT) in the study area for major arterials and controlled access roadways for both sides of the border for five years preceding the date of the application;

(ii) data from any existing international bridge or other international crossing in the study area indicating AADT for the five preceding years;

(iii) data from any existing international bridge or other international crossing in the study area indicating average delay time for traffic seeking to use any international bridge or other international crossing for the five preceding years;

(iv) projected AADT for the proposed bridge and other crossings in the study area 20 years after completion (projections shall be based on the current department travel demand model, and the process used to make the projections shall be clearly identified and submitted with the data);

(v) a comparison of the project with other similar projects already in operation; and

(vi) a projection of changes in the free flow of trade caused by the project.

(3) Social and environmental impact. An applicant shall conduct a study of the social and environmental impact of the project and shall provide for public involvement and notice to local officials.

(A) Environmental documentation. An applicant shall comply with the requirements in Chapter 2 of this title (relating to Environmental Policy) and shall obtain the environmental approvals required for the project prior to submittal of the application. The applicant shall coordinate concurrently with the U.S. Department of State and the department regarding the form and content of an environmental document prepared under Subchapters A and C of Chapter 2 of this title.

(B) Public involvement. An applicant shall comply with the public involvement requirements in Chapter 2 of this title that apply to paragraph (3)(A) of this section. Notices of public meetings and public hearings must include:

(i) a statement that the applicant intends to submit an international bridge application to the commission;

(ii) a description of the proposed bridge, including a description of the design and adjacent facilities and identification of the area to be served; and

(iii) instructions that competing bridge applicants may submit information pertaining to the design, financial feasibility, and social and environmental impact of a competing project to the applicant no later than 60 days after the date of the notice.

(C) Notice to local officials. The applicant shall send a copy of the notice described in paragraph (3)(B) of this section by first class mail to the county judge of each county within 150 miles of the location of the project and the mayor of each municipality within 50 miles of the location of the project.

(4) Analysis of competing applications. An applicant shall address the impact of competing projects (if any) and demonstrate how its submittal is superior to that of any competing bridge applicant.

(A) The applicant's preliminary study analysis shall be performed depicting any competing projects. The applicant shall perform an analysis demonstrating the applicant's project as a stand-alone project and, if there is a competing project, an analysis showing both the applicant's project and any competing projects. The analysis reflecting the competing projects must demonstrate how design, traffic, financial, social, and environmental impacts are affected by the competing projects and shall include the rationale for how one project is superior based on these impacts, for example, cost benefits, project viability, better design, and less adverse social and environmental impacts.

(B) The applicant will not be required to include an analysis of the competing project unless the competing bridge applicant provides the information described in paragraph (3)(B)(iii) of this section by the deadline specified in that paragraph.

§15.75. Department Action.

(a) Coordination.

(1) Upon the receipt of a complete application, the department will submit a copy of the application and request views and comments from the:

(A) Department of Public Safety of the State of Texas;

(B) Texas Commission on Environmental Quality;

(C) Texas Historical Commission;

(D) Department of Agriculture;

(E) Texas Alcoholic Beverage Commission;

(F) Texas Parks and Wildlife Department;

(G) Office of the Governor;

(H) any other state agency the department determines is appropriate considering the nature of the project; and

(I) any entity which may be significantly affected by the project.

(2) The department will also seek the advice of the local metropolitan planning organization, if any, as to whether the project will be consistent with the regional transportation plan.

(3) The department will allow an agency or entity 20 days from the date the agency or entity receives a copy of the application for the submission of views and comments under this subsection.

(b) Process and analysis of application.

(1) The department reserves the right to return, or hold, pending corrections submitted by the applicant, an application that the department determines is not in full compliance with the requirements of §15.74 of this subchapter (relating to Application). The department, when returning an application, will identify in writing all areas deemed to be deficient.

(2) The department and the commission will not perform work to recast, redraw, calculate, construct, reconstruct, or otherwise produce any element of the preliminary study which is not adequately presented by the applicant.

(3) The commission may consider missing, ambiguous, uncertain, or unclear elements in the financial feasibility study as tending to the conclusion that the project has substantial speculative elements in its financing and should not be approved.

(4) The commission will consider the impact of a competing bridge, whether proposed, approved, or constructed. The commission will consider information provided by a competing bridge applicant only to the extent the competing bridge applicant timely submitted the information to the applicant under §15.73 of this subchapter. The commission will consider any other information provided by the department.

(c) Public hearing. If the department finds that the application meets the requirements of this section, it shall notify the applicant of its findings, forward a copy of the findings to the Office of the Governor, and shall conduct a public hearing to receive public comment on the project. A public hearing held by the department under this subsection shall be conducted by the executive director of the department or the director's designee in accordance with §1.5 of this title (relating to Public Hearings). Any persons, including, but not limited to, official representatives of a county, municipality, metropolitan planning organization, or other governmental entity, and any individual, group, or association may provide comment.

(d) Report to commission. Subsequent to the public hearing, the department will submit the application together with its findings and recommendations to the commission for appropriate action. The department will consider the views and comments received under subsection (a) of this section prior to making its findings and recommendations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2006.

TRD-200604747
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Effective date: September 14, 2006
Proposal publication date: June 9, 2006
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Department of Information Resources

Title 1, Part 10

The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.4, "Historically Underutilized Business Program." The review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renée Mauzy, General Counsel, via mail at P.O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200604763
Renée Mauzy
General Counsel
Department of Information Resources
Filed: August 25, 2006

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The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.9, "Board Policies." The review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renée Mauzy, General Counsel, via mail at P.O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200604760
Renée Mauzy
General Counsel
Department of Information Resources
Filed: August 25, 2006

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The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.19, "Establishment of Quality Assurance Guidelines for Projects in Texas State Agencies." The review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renée Mauzy, General Counsel, via mail at P.O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200604761
Renée Mauzy
General Counsel
Department of Information Resources
Filed: August 25, 2006

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The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 207, §§207.1 - 207.8, "Telecommunications Services Division." The review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renée Mauzy, General Counsel, via mail at P.O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200604762
Renée Mauzy
General Counsel
Department of Information Resources
Filed: August 25, 2006

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Texas Optometry Board

Title 22, Part 14

The Texas Optometry Board, files this notice of intention to review Texas Administrative Code, Title 22, Chapters 271, 272, 273 and 275, pursuant to the requirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for readoption.

The agency has conducted a preliminary assessment of the following rules in Chapters 271, 272, 273 and 275, and has determined that the reasons for initially adopting the rules continue to exist:

Chapter 271

§271.1. Definitions.

§271.2. Applications.

§271.3. Jurisprudence Examination Administration.

§271.5. Licensure Without Examination.

§271.6. National Board Examination.

Chapter 272

§272.1 Open Records.

§272.2 Historically Underutilized Businesses.

§272.3 Bid and Purchasing Protest Procedures.

Chapter 273. General Rules.

§273.1. Surrender of License.

§273.2. Use of Name of Retired or Deceased Optometrist.

§273.3. Contact Lenses as Prize or Premium.

§273.4. Fees (Not Refundable).

§273.5. Limited License for Clinical Faculty.

§273.6. Provisional License.

§273.7. Inactive Licenses.

§273.8. Renewal of License.

§273.9. Public Interest Information.

§273.10. Licensee Compliance with Guaranteed Student Loan Corporation.

§273.11. Public Participation in Meetings.

§273.12. Profile Information Chapter.

275. Continuing Education.

§275.1. General Requirements.

§275.2. Required Education.

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-200604787
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: August 28, 2006

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Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) publishes this notice of intent to review Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers, pursuant to Texas Government Code §2001.039, *Agency Review of Existing Rules*. The text of the rule sections will not be published. The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.state.tx.us. Project Number 33043 is assigned to this proceeding.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to the Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reason for adopting or readopting the rules continues to exist. The commission requests specific comments from interested persons on whether the reasons for adopting each section of Chapter 26 continues to exist. If it is determined during this review that any section of Chapter 26 needs to be repealed or amended, the repeal or amendment will be initiated under a separate proceeding. This notice of intent to review Chapter 26 has no effect on the sections as they currently exist.

Angie Welborn, Attorney, Legal Division and Adriana Gonzales, Rules Coordinator, Docket Management Division, have determined that for each year of the first five-year period the sections are in effect there will be no new fiscal implications for state or local government as a result of enforcing or administering these sections that are not already in effect as a result of the previous adoption of these sections.

Ms. Welborn and Ms. Gonzales have determined that for each year of the first five years these sections are in effect the public benefit anticipated as a result of enforcing these sections will be protection of the public interest inherent in the rates and services of public utilities, and monitoring of the established regulatory system to assure rates, operations, and services that are just and reasonable to the consumers and utilities. There will be no new effect on small businesses or micro-businesses as a result of enforcing these sections that is not already in effect as a result of the previous adoption of these sections. There are no new anticipated economic costs to persons who are required to comply with

these sections as noticed for review that are not already in effect as a result of the previous adoption of these sections.

Ms. Welborn and Ms. Gonzales have also determined that for each year of the first five years the sections are in effect there should be no effect on a local economy as a result of this review, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the review of Chapter 26 (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. When filing comments interested persons are requested to comment on the sections in the same order they are found in the chapters and to clearly designate which section is being commented upon. All comments should refer to Project Number 33043.

The rule chapter subject to this review is proposed for publication under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and Texas Government Code §2001.039 (Vernon 2000, Supplement 2005) which requires each state agency to review its rules every four years.

Cross Reference to Statutes: Texas Utilities Code Annotated, Title II, Public Utility Regulatory Act, §11.002 and §14.002; Texas Government Code §2001.039.

SUBCHAPTER A. GENERAL PROVISIONS.

16 TAC §26.1. Purpose and Scope of Rules.

16 TAC §26.2. Cross-Reference Transition Provision.

16 TAC §26.3. Severability Clause.

16 TAC §26.4. Statement of Nondiscrimination.

16 TAC §26.5. Definitions.

16 TAC §26.6. Cost of Copies of Public Information.

16 TAC §26.7. Local Exchange Company Assessment.

16 TAC §26.8. Relief for Victims of Hurricanes of Katrina and Rita.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION.

16 TAC §26.21. General Provisions of Customer Service and Protection Rules.

16 TAC §26.22. Request for Service.

16 TAC §26.23. Refusal of Service.

16 TAC §26.24. Credit Requirements and Deposits.

16 TAC §26.25. Issuance and Format of Bills.

16 TAC §26.26. Foreign Language Requirements.

16 TAC §26.27. Bill Payment and Adjustments.

16 TAC §26.28. Suspension or Disconnection of Service.

16 TAC §26.29. Prepaid Local Telephone Service (PLTS).

16 TAC §26.30. Complaints.

16 TAC §26.31. Disclosures to Applicants and Customers.

16 TAC §26.32. Protection Against Unauthorized Billing Charges ("Cramming").

16 TAC §26.34. Telephone Prepaid Calling Services.

16 TAC §26.37. Texas No-Call List.

SUBCHAPTER C. QUALITY OF SERVICE.

16 TAC §26.51. Continuity of Service.

16 TAC §26.52. Emergency Operations.

16 TAC §26.53. Inspections and Tests.

16 TAC §26.54. Service Objectives and Performance Benchmarks.

16 TAC §26.55. Monitoring of Service.

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION.

16 TAC §26.71. General Procedures, Requirements and Penalties.

16 TAC §26.72. Uniform System of Accounts.

16 TAC §26.73. Financial and Operating Reports.

16 TAC §26.74. Reports on Sale of Property and Mergers.

16 TAC §26.75. Reports on Sale of 50% or More of Stock.

16 TAC §26.76. Gross Receipts Assessment Report.

16 TAC §26.77. Payments, Compensation, and Other Expenditures.

16 TAC §26.78. State Agency Utility Account Information.

16 TAC §26.79. Equal Opportunity Reports.

16 TAC §26.80. Annual Report on Historically Underutilized Businesses.

16 TAC §26.81. Service Quality Reports.

16 TAC §26.82. Construction Reports.

16 TAC §26.84. Annual Reporting of Affiliate Transactions of DCTUs.

16 TAC §26.85. Report of Workforce Diversity and Other Business Practices.

16 TAC §26.87. Infrastructure Reports.

16 TAC §26.88. Traffic Usage Studies.

16 TAC §26.89. Information Regarding Rates and Services of Nondominant Carriers.

16 TAC §26.98. Cost Allocation Manual.

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION.

16 TAC §26.101. Certification Criteria.

16 TAC §26.102. Registration of Pay Telephone Service Providers.

16 TAC §26.103. Affiliate Guidelines for Certificates of Convenience and Necessity Holders.

16 TAC §26.107. Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Nondominant Telecommunications Carriers.

16 TAC §26.109. Standards for Granting of Certificates of Operating Authority (COAs)

16 TAC §26.111. Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs).

16 TAC §26.113. Amendment of Certificate of Operating Authority (COA) or Service Provider Certificate of Operating Authority (SPCOA).

16 TAC §26.114. Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs).

SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE.

16 TAC §26.121. Privacy Issues.

16 TAC §26.122. Customer Proprietary Network Information.

16 TAC §26.123. Caller Identification Services.

16 TAC §26.124. Pay-Per-Call Information Services Call Blocking.

16 TAC §26.125. Automatic Dial Announcing Devices (ADAD).

16 TAC §26.126. Telephone Solicitation.

16 TAC §26.127. Abbreviated Dialing Codes.

16 TAC §26.128. Telephone Directories.

16 TAC §26.129. Standards for Access to Provide Telecommunications Services at Tenant Request.

16 TAC §26.130. Selection of Telecommunications Utilities.

16 TAC §26.131. Competitive Local Exchange Carrier (CLEC)-to-CLEC and CLEC-to- Incumbent Local Exchange Carrier (ILEC) Migration Guidelines.

16 TAC §26.133. Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs)

16 TAC §26.134 Market Test to be Applied in Determining if Markets with Populations Less than 30,000 Should Remain Regulated on or After January 1, 2007.

SUBCHAPTER G. ADVANCED SERVICES.

16 TAC §26.141. Distance Learning, Information Sharing Programs, and Interactive Multimedia Communications.

16 TAC §26.142. Integrated Services Digital Network (ISDN).

16 TAC §26.143. Provision of Advanced Services in Rural Areas.

SUBCHAPTER I. ALTERNATIVE REGULATION.

16 TAC §26.171. Small Incumbent Local Exchange Company Regulatory Flexibility.

16 TAC §26.172. Voting Procedures for Partial Deregulation or Reversal of Partial Deregulation of Telephone Cooperatives.

16 TAC §26.175. Reclassification of Telecommunications Services for Electing Incumbent Local Exchange Companies (ILECs).

SUBCHAPTER J. COSTS, RATES AND TARIFFS.

16 TAC §26.201. Cost of Service.

16 TAC §26.202. Adjustment for House Bill 11, Acts of 72nd Legislature, First Called Special Session 1991.

16 TAC §26.203. Rate Policies for Small Local Exchange Companies (SLECs).

16 TAC §26.205. Rates for Intrastate Access Services.

16 TAC §26.206. Depreciation Rates.

16 TAC §26.207. Form and Filing of Tariffs.

16 TAC §26.208. General Tariff Procedures.

16 TAC §26.209. New and Experimental Services.

16 TAC §26.210. Promotional Rates for Local Exchange Company Services.

16 TAC §26.211. Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges.

16 TAC §26.214. Long Run Incremental Cost (LRIC) Methodology for Services provided by Certain Incumbent Local Exchange Companies (ILECs).

16 TAC §26.215. Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services.

16 TAC §26.216. Educational Percentage Discount Rates (E-Rates).

16 TAC §26.217. Administration of Extended Area Service (EAS) Requests.

16 TAC §26.219. Administration of Expanded Local Calling Service Requests.

16 TAC §26.221. Applications to Establish or Increase Expanded Local Calling Service Surcharges.

16 TAC §26.223. Prohibition of Excessive COA/SPCOA Usage Sensitive Intrastate Switched Access Rates.

16 TAC §26.224. Requirements Applicable to Basic Network Services for Chapter 58 Electing Companies.

16 TAC §26.225. Requirements Applicable to Nonbasic Services For Chapter 58 Electing Companies.

16 TAC §26.226. Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies.

16 TAC §26.227. Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies.

16 TAC §26.228. Requirements Applicable to Chapter 52 Companies.

16 TAC §26.229. Requirements Applicable to Chapter 59 Electing Companies.

SUBCHAPTER L. WHOLESALE MARKET PROVISIONS.

16 TAC §26.271. Expanded Interconnection.

16 TAC §26.272. Interconnection.

16 TAC §26.274. Imputation.

16 TAC §26.275. IntraLATA Equal Access.

16 TAC §26.276. Unbundling.

16 TAC §26.283. Infrastructure Sharing.

SUBCHAPTER M. OPERATOR SERVICES.

16 TAC §26.311. Information Relating to Operator Services.

16 TAC §26.313. General Requirements Relating to Operator Services.

16 TAC §26.315. Requirements for Dominant Certificated Telecommunications Utilities (DCTUs).

16 TAC §26.317. Information to be Provided at the Telephone Set.

16 TAC §26.319. Access to the Operator of a Local Exchange Company (LEC).

16 TAC §26.321. 9-1-1 calls, "0-" calls, and End User Choice.

SUBCHAPTER N. PAY TELEPHONE SERVICE.

16 TAC §26.341. General Information Relating to Pay Telephone Service (PTS).

16 TAC §26.342. Pay Telephone Service Tariff Provisions.

16 TAC §26.343. Responsibilities for Pay Telephone Service (PTS) of Certificated Telecommunications Utilities (CTUs) Holding Certificates of Convenience and Necessity (CCNs).

16 TAC §26.344. Pay Telephone Service Requirements.

16 TAC §26.345. Posting Requirements for Pay Telephone Service Providers.

16 TAC §26.346. Rates and Charges for Pay Telephone Service.

16 TAC §26.347. Fraud Protection for Pay Telephone Service.

SUBCHAPTER O. NUMBERING.

16 TAC §26.375. Reclamation of Codes and Thousand-Blocks and Petitions for Extension of Code and Thousands-Block Activation.

SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND.

16 TAC §26.401. Texas Universal Service Fund (TUSF).

16 TAC §26.403. Texas High Cost Universal Service Plan (THCUSP).

16 TAC §26.404. Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan.

16 TAC §26.406. Implementation of the Public Utility Regulatory Act §56.025.

16 TAC §26.408. Additional Financial Assistance (AFA).

16 TAC §26.410. Universal Service Fund Reimbursement for Certain IntraLATA Service.

16 TAC §26.412. Lifeline Service and Link Up Service Programs.

16 TAC §26.414. Telecommunications Relay Service (TRS).

16 TAC §26.415. Specialized Telecommunications Assistance Program (STAP).

16 TAC §26.417. Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF).

16 TAC §26.418. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

16 TAC §26.420. Administration of Texas Universal Service Fund (TUSF).

16 TAC §26.421. Designation of Eligible Telecommunications Providers to Provide Service to Uncertificated Areas.

16 TAC §26.422. Subsequent Petitions for Service in Uncertificated Areas.

16 TAC §26.423. High Cost Universal Service Plan for Uncertificated Areas where an Eligible Telecommunications Provider (ETP) Volunteers to Provide Basic Local Telecommunications Service.

16 TAC §26.424. Audio Newspaper Assistance Program.

SUBCHAPTER Q. 9-1-1 ISSUES.

16 TAC §26.431. Monitoring of Certain 911 Fees.

16 TAC §26.433. Roles and Responsibilities of 9-1-1 Service Providers.

16 TAC §26.435. Cost Recovery Methods for 9-1-1 Dedicated Transport.

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT.

16 TAC §26.461. Access Line Categories.

16 TAC §26.463. Calculation and Reporting of a Municipality's Base Amount.

16 TAC §26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

16 TAC §26.467. Rates, Allocation, Compensation, Adjustments and Reporting.

16 TAC §26.468. Procedure for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting.

16 TAC §26.469. Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records.

TRD-200604668
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 23, 2006

♦ ♦ ♦

Texas Real Estate Commission

Title 22, Part 23

The Texas Real Estate Commission (TREC) proposes to review Chapter 534, General Administration and Chapter 537, Professional Agreements and Standard Contracts, in accordance with the Texas Government Code, §2001.039.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continues to exist. During the review process, TREC may also determine that a specific rule may need to be amended to further refine TREC's legal and policy considerations, whether the rules reflect current TREC procedures, that no changes to a rule as currently in effect are necessary, or that a rule is no longer valid or applicable. Rules will also be combined or reduced for simplification and clarity when feasible. Readopted rules will be noted in the *Texas Register's* "Rules Review" section without publication of the text. Any proposed amendments or repeal of a rule or chapter as a result of the review will be published in the "Proposed Rules" section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption or repeal.

TREC invites comments during the review process for 30 days following the publication of this notice in the *Texas Register*. Any questions or comments pertaining to this notice of intention to review should be directed to Loretta R. DeHay, General Counsel, Texas Real Estate Commission. P.O. Box 12188, Austin, Texas 78711-2188 or e-mail to general.counsel@trec.state.tx.us within 30 days of publication.

TRD-200604892
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Filed: August 30, 2006

♦ ♦ ♦

Adopted Rule Review

Texas Real Estate Commission

Title 22, Part 23

The Texas Real Estate Commission (TREC) adopts the review of Chapters 531 and 533 in accordance with the Texas Government Code,

§2001.039. The proposed notice of review was published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4241).

In conjunction with this review, the agency adopted amendments to §533.34 and §533.35. These actions were published in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6735). The amendments update the rules for consistency and clarity with the underlying and related statutory provisions. The agency has determined that, with this change, the reasons for adopting the sections in Chapters 531 and 533 continue to exist.

No comments were received in response to the notice of the proposed rule review as published in the above-referenced issue of the *Texas Register*. This concludes the review of Chapter 531: Canons of Professional Ethics and Conduct for Real Estate Licensees and Chapter 533: Practice and Procedure.

TRD-200604893
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Filed: August 30, 2006

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Application for Texas Certification of Voting System - Form 100

Name of Company	
Voting System Name and Release #	
Street Address, City, State, Zip	
Contact Name & Title	
Phone Number	
Fax Number	
E-Mail Address	

	Component Submitted for Certification	Version/ Firmware #	Previous Texas Certification Date*	EAC/NASED Qualification Date for this Version	EAC/NASED Qualification Number for this Version
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					

*For the most recent certification, or state "None"

Materials Checklist (Indicate materials submitted with an "X")

7 copies of the following (5 copies in electronic format and 2 hard copies):	
	Completed application Forms 100 and Form 101
	If applicable, attach Form 100 - Schedule A, listing recommendations/issues made from previous Texas examination. List how they have been corrected or addressed. If the have not, explain why.
	If component has been modified, include log detailing changes from the previously Texas certified version
	ITA Reports of all tests (including summary) conducted on items submitted
	Operating Manual(s)
	Maintenance Manual(s)
	Training Manual(s)
	Technical Specifications
	Operational Specifications
	List all COTS hardware/software used with the system and their version numbers – If listed in ITA report state where
	Provide complete step-by-step installation instructions for all software installs and configurations specific to Texas
	List of other election jurisdictions where system is in use or has been in use

Acknowledge which ITA has been notified to send 4 copies of the software and source code and expected delivery date to our office.

ITA Name	Delivery Date

Signature of Person Making Request	Title	Date

Please submit the certification fee and all relevant materials to:

Irene Diaz
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Figure 2: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Roger Williams
Secretary of State

VOTING SYSTEM CERTIFICATION – FORM 100 SCHEDULE A

	Component	Issue *	How Addressed
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			

* From the last time this component was examined

Use additional sheets as necessary

S:\doc\vmcerts\application packet\Form 100 - Schedule A.doc

Figure 3: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Roger Williams
Secretary of State

VOTING SYSTEM CERTIFICATION – FORM 101

The following questions must be answered with regard to each voting system being certified. Answers should be set forth on a separate sheet of paper and attached to this form. Explain how the voting system:

1. Preserves the secrecy of the ballot;
2. Is suitable for the purpose for which it is intended;
3. Operates safely, efficiently, and accurately;
4. Is safe from fraudulent or unauthorized manipulation;
5. Permits voting on all offices and measures to be voted on at an election;
6. Prevents counting votes on offices and measures on which the voter is not entitled to vote;
7. Prevents counting votes by the same voter for more than one candidate for the same office, and prevents counting votes for more than the number of candidates for which the voter is entitled to vote;
8. Prevents counting a vote on the same office or measure more than once;
9. Permits write-in voting;
10. Is capable of permitting straight-party voting;
11. Is capable of providing records from which the operation of the voting system may be audited; and
12. Is capable of producing a summary screen to allow voters to examine their choices before the ballot is finally cast; and
13. Is capable of producing a real-time audit log (Texas Administrative Code (TAC) § 81.62); and
14. Is capable of casting a blank ballot; and
15. (Electronic Ballot Image Systems (EX: DRE) only) List procedure for provisional voting or reference where this is in your documentation. (TAC § 81.176); and
16. (Electronic Ballot Image Systems (EX: DRE) only) List procedure for a recount (printing of electronic ballot images and audit logs); and
17. (Electronic Ballot Image Systems (EX: DRE) only) List procedure to backup electronic files created from the election (EX: electronic ballot images and audit logs, etc.)

18. Procedures on how to properly shutdown equipment during early voting or reference where this is in your documentation; and

19. (Precinct Optical Scanners only) Can two locks be placed on the ballot box to make it legal to use at an early voting site? If so, please list how a jurisdiction can have this done; and

20. Are your manufacturers ISO 9000 compliant? If not, explain quality control.

Figure: 16 TAC §25.505(g)(4)

$\sum$((RTEP - POC) * (number of minutes in a settlement interval / 60 minutes per hour)) for each settlement interval when RTEP - POC >0

Figure: 22 TAC §661.99(6)

Citation	Violation	Sanction on a First Offense
§1071.251(b)	Engaging in the practice of professional land surveying without registration	Injunction/1500
§1071.251(c)	Offering to practice professional land surveying without registration	Injunctin/1500
§1071.251(d)	Using a title or advertising a title or description that tends to convey the impression that a non registered/licensed person is a professional land surveyor	Injunction/1500
§1071.261(a)	Failure to display the certificate or license at a person's place of business or practice	Reprimand/100
§1071.263(a)	The practice of professional surveying while license has been placed on Inactive Status	Revocation/1500
§1071.351(b)	Failure to secure an impression seal (§661.46)	Reprimand/100
§1071.351(d)	Application of name, seal or certification to surveying work that is not prepared by registrant/licensee or full time employee supervised by registrant/licensee	Revocation/1500
§1071.351(e)	Allowing a non registrant/licensee to exert control over surveying work	Revocation/1500
§1071.352(a)	Offering surveying services with no RPLS employed full-time where the services are offered	Injunction/ 1500 Reprimand/1500
§1071.352(b)	Failure of group practice to properly identify the registrant responsible for the practice	Injunction/ 1500 Reprimand/1500
§1071.353	Failure to file notice of assumed name	Reprimand/100
§1071.359(a)	Failure to sign and notate "Licensed State Land Surveyor"(LSLS) on all LSLS official field notes	Reprimand/100
§1071.359(b)	Failure to conform LSLS field notes and plats to specifications contained in Section 21 of the Natural Resources Code	Reprimand/100
§1071.360(1) and (2)	Failure of the LSLS to notify person who has undisclosed public land enclosed and/or forward a report of undisclosed public land and the acreage to the commissioner	Reprimand/100
§1071.361(a)	Failure to allow LSLS access to County Surveyor's records	Reprimand/1500
§1071.361(c)	Failure to comply with any regulations prescribed by the county surveyor or the commissioners court for protecting and preserving the records	Reprimand/1500
§1071.401(a)(1)	Fraud or deceit in obtaining a certificate or license	Revocation/1500
§1071.401(a)(2)	Gross negligence, incompetence, or misconduct in the practice of surveying	Revocation/1500
§1071.401(a)(3)	Violation of the Act or Board Rule	Revocation/1500
§1071.401(b)	LSLS directly or indirectly interested in the purchase or acquisition of title to public land	Revocation/1500
§1071.504(1)	Engaging or offering land surveying services without being registered/licensed	Injunction/1500
§1071.504(2)	Presents or attempts to use another person's certificate, license or seal	Revocation/1500 Injunction/1500
§1071.504(3)	Giving false or forged evidence to obtain or assist another in obtaining a registration/license	Revocation/1500
§661.45(f)	Actions to compromise the examination	Disqualification/1500

Citation	Violation	Sanction on a First Offense
§661.46	Failure to secure an impression seal and submit impression to the Board	Reprimand/100
§661.52(b)	Practicing professional land surveying while on Inactive Status	Revocation/1500
§661.52(c)	Using seal while on Inactive Status	Revocation/1500
§661.55(a)	Failure to file an accurate Certificate of Firm Name	Reprimand/1500
§661.55(b)	Failure to ensure that association, partnership or corporation employing surveyor files a Certificate of Firm Name	Reprimand/1500
§661.55(c)	Failure to notify the Board in writing within five (5) business days prior to leaving employment or no later than 24 hours after leaving employment	Reprimand/1500
§661.60	Failure to respond to Board inquiries/orders	Reprimand/1500
§661.95	Failure to attend hearing	Default Judgment
§661.121	Firms failure to employee a full-time RPLS	Injunction/1500
§663.1(c)	Failure to notify the Board of any change of mailing address as it occurs	Reprimand/100
§663.1(d)	Failure to notify consumers of the name, mailing address, and phone number of the Board	Reprimand/100
§663.3(1)	Failure to accurately and truthfully represent ones capabilities and qualifications	Reprimand/100
§663.3(2)	Performing services for which he/she is not qualified	Reprimand/100
§663.3(3)	Evading statutory responsibility to client or employer	Reprimand/100
§663.4(1)	Performing surveying services if there exists any financial or other interest that may be in conflict with the obligation to render a faithful discharge of such services	Reprimand/1500
§663.4(4)	Failure to withdraw from employment at any time during such employment or engagement when it becomes apparent that it is not possible to faithfully discharge the duty and performance of services owned the client or employer	Reprimand/1500
§663.4(5)	Accepting remuneration from any party other than his/her client or employer for a particular project nor have any other direct or indirect financial interest in other services or phase of service to be provided for such project	Reprimand/1500
§663.4(6)	Failure to keep inviolate the confidences of his/her client or employer	Reprimand/1500
§663.5	Failure to perform work with integrity, truthfulness and accuracy. Misleading the public	Reprimand/1500
§663.5(1)	Allowing a person who is not registered or licensed to exert control over professional work	Reprimand/1500
§663.5(2)	Indulging in publicity that is false, misleading or deceptive	Reprimand/100
§663.5(3)	Misrepresenting the amount or extent of prior education or experience to any employer, client, or the board	Reprimand/100
§663.5(5)	Representing themselves as being engaged in a partnership or association when no partnership or association exists	Reprimand/100

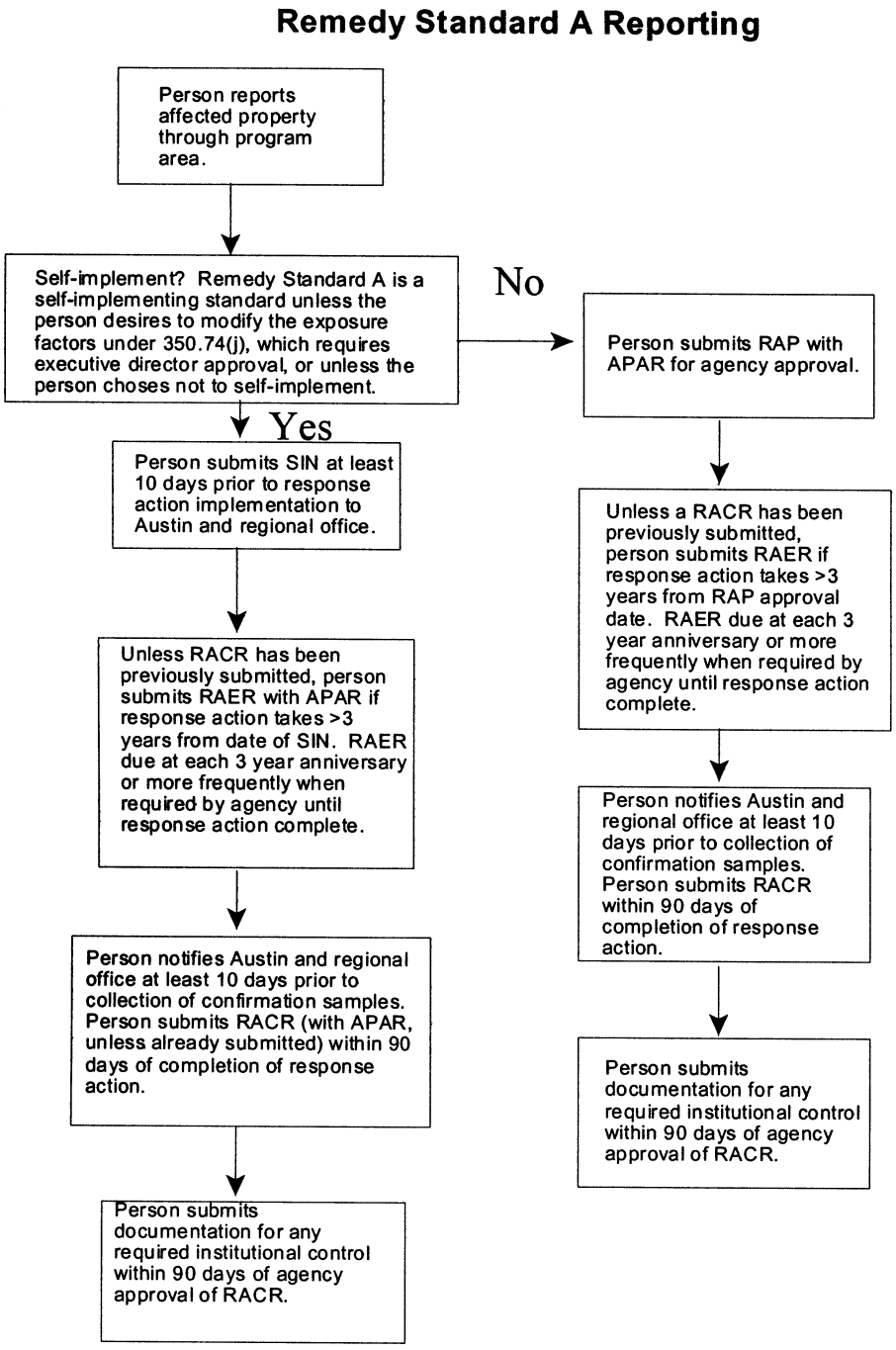
Citation	Violation	Sanction on a First Offense
§663.5(6)	Recommend to a client services of another for the purpose of collecting a fee for himself, without the knowledge and consent of client	Reprimand/100
§663.6(1)	Failure to make known to the board any unauthorized practice of which the registrant has personal knowledge	Reprimand/100
§663.6(2)	Failure to divulge any information, of which the registrant has personal knowledge, related to any unauthorized practice to the board upon request	Reprimand/100
§663.6(3)	Delegate responsibility to, nor aid or abet, an unauthorized person to practice or offer to practice	Reprimand/1500
§663.8(1)	Failure to abide by and conform to the registration and licensing laws of the state	Reprimand/1500
§663.8(2)	Failure to abide by and conform to the provisions of the state code and all local codes and ordinances	Reprimand/1500
§663.8(4)	Signing or impressing ones seal or stamp upon documents not prepared by him/her or knowingly permit ones seal or stamp to be used by any other person	Reprimand/1500
§663.8(5)	Submitting a request or a competitive bid to perform professional surveying services for a governmental entity or political subdivision of the State of Texas unless specifically authorized by state law	Reprimand/100
§663.9(a)	Offering or promising to pay any commission, contribution, gift, favor, gratuity, or reward as an inducement to secure any specific work without full disclosure to all interested parties	Reprimand/100
§663.9(b)	Making, publishing or cause to be made or published any representation or statement concerning ones professional qualifications or those of his/her partners or associates that is misleading	Reprimand/100
§663.9(c)	Failure to have personal knowledge of documents, plats, maps or reports that bear the surveyor's seal or signature	Reprimand/1500
§663.10(1)	Violating any provision of the Act or Rules	Reprimand/100
§663.10(2)	Circumventing or attempting to circumvent any provision of the Act or Rules	Reprimand/1500
§663.10(3)	Participate in any plan, scheme or arrangement attempting to or having as its purpose the evasion of any provision of the Act or Rules	Reprimand/1500
§663.10(4)	Failure to exercise reasonable care or diligence to prevent his/her partners, associates or employees from engaging in conduct which, if done by him/her, would violate any of the provisions of the Act or Rules	Reprimand/1500
§663.10(5)	Engaging in any conduct that discredits or attempts to discredit the profession of surveying	Reprimand/100
§663.10(6)	Permit or allow ones professional identification, seal, form, business name or service to be used or made use of to make it possible to create the opportunity for the unauthorized practice of professional surveying by any person, firm or corporation	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.10(7)	Allowing an omission or making an assertion or representation that is fraudulent, deceitful or misleading or tends to create a misleading impression	Reprimand/1500
§663.10(8)	Aid or abet any unlicensed person in connection with the authorized practice of professional surveying or any firm or corporation in the practice of professional surveying unless carried on in accordance with the Act	Reprimand/1500
§663.11	Failure to set or leave as found markers to represent or reference boundary corners, angle points and points of curvature or tangency. Failure to show and describe the locations of such markers on the plat	Reprimand/1500
§663.11(1)	Failure to reference and describe the survey markers as shown on the plat	Reprimand/1500
§663.11(2)	Failure to seal and sign the plat	Reprimand/1500
§663.15(a)	Failure to achieve a positional tolerance of 1:10,000 + 0.10 feet within the corporate city limits	Reprimand/1500
§663.15(b)	Failure to achieve a positional tolerance of 1:7,500 + 0.10 feet within the extraterritorial jurisdiction (ETJ) of any city	Reprimand/1500
§663.15(c)	Failure to achieve a positional tolerance of 1:5,000 + 0.10 feet in rural areas outside ETJ	Reprimand/1500
§663.15(d)	Failure to report areas to the least significant number compatible with the precision of closure	Reprimand/100
§663.15(e)	Failure to use equipment and methods of practice capable of attaining the tolerances specified	Reprimand/1500
§663.16(a)	Failure to delineate a property or boundary line as an integral portion of a survey. Failure to respect junior/senior property rights, footsteps of the original surveyor, intent of the parties involved, the proper application of the rules of dignity or the priority of calls, and applicable statutory and case law of Texas	Reprimand/1500
§663.16(b)	Failure to rely upon appropriate deeds and/or other documents including those for adjoining parcels, for the location of the boundaries of the subject parcel(s)	Reprimand/1500
§663.16(c)	Failure to assume the responsibility for such research of adequate thoroughness to support the determination of the location of intended boundaries of the land parcel surveyed	Reprimand/1500
§663.16(d)	Failure to connect all boundaries to identifiable physical monuments related to corners of record dignity. In the absence of such monumentation, failure to report the surveyor's opinion of the boundary location by other appropriate physical evidence.	Reprimand/1500
§663.17(a)	Failure to set monuments at sufficient depths to retain a stable and distinctive location or be of sufficient size to withstand the deteriorating forces of nature or be of such material that in the surveyor's judgment will best achieve this goal	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.17(b)	Failure to set, or leave as found, sufficient, stable and reasonably permanent survey markers to represent or reference the property or boundary corners, angle points, and points of curvature or tangency. Failure to show and describe survey markers with sufficient evidence of the location of such markers on the surveyors' plat.	Reprimand/1500
§663.17(b)(1)	Failure to reference a description of survey markers shown on the plat, when written reports are filed in compliance with §663.17(b)	Reprimand/1500
§663.17(b)(2)	Failure to apply seal and signature to written reports when filed in compliance with §663.17(b)	Reprimand/100
§663.17(d)	Failure to mark, in a way that is traceable, all monuments; when practical	Reprimand/100
§663.18(a)	Failure to apply surveyor's seal to all documents representing professional surveying	Reprimand/100
§663.18(c)	When preparing preliminary documents, failure to identify the purpose of the document, the surveyor of record and the surveyor's registration number, and the release date. Failure to note the following statement in the signature space: "Preliminary, this document shall not be recorded for any purpose."	Reprimand/1500
§663.18(d)	Failure to certify only to factual information that the surveyor has personal knowledge of or to information within his professional expertise	Reprimand/1500
§663.19(1)	Failure to delineate the relationship between record monuments and the location of boundaries surveyed. Failure to show such relationship on the survey plat, if a plat is prepared, and/or separate report and failure to recite such in the description with the appropriate record referenced thereon and therein.	Reprimand/1500
§663.19(2)	Failure to provide a definite and unambiguous identification of the location of boundaries and describe all pertinent monuments found or placed for descriptions prepared for defining boundaries	Reprimand/1500
§663.19(3)	Failure to prepare the plat to a convenient scale and provide a definite and unambiguous representation of the location of the surveyed land according to its record description	Reprimand/1500
§663.19(3)(A) and (B)	Where material discrepancies are found between the record and conditions discovered, failure to apprise the client with a specific reference to discrepancy on the plat or a report of survey or other written notice	Reprimand/1500
§663.19(4)	Failure to reference courses by notation upon the survey plat to an identifiable line for directional control	Reprimand/1500
§663.19(5)	Failure to note the firm name, surveyor's name, address, and phone number of the land surveyor responsible for the land survey, his/her official seal, his/her original signature and date surveyed on the plat	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.19(6)	Failure to note, upon the survey plat, which boundary monuments were found or placed by the surveyor and failure to note controlling monuments to which the survey may be referenced	Reprimand/1500
§663.19(7)	Failure to cite a reference on the plat to the record instrument that defines the location of adjoining boundaries	Reprimand/1500
§663.19(9)	If any report consists of more than one part, failure to note the existence of the other part or parts	Reprimand/1500
§663.20(a)(1)	Failure of the registrant to notify the Board in writing within 90 days of any felony or misdemeanor conviction	Reprimand/1500
§663.20(a)(2)	Failure of an applicant to state if he/she has ever been convicted of a felony or misdemeanor	Application Rejected Revocation
§663.20(a)(3)	Failure of the registrant/applicant to provide a summary of the conviction in sufficient detail to allow the Board to determine if it is applicable to the practice of land surveying	Application Rejected Revocation
§663.21(1)	Falsifying the recipient or purpose of a metes and bounds description when preparing a description for a Political Subdivision	Reprimand/1500
§663.21(2)	Preparing a description for a Political Subdivision that is ambiguous and non-locatable on the ground by ordinary surveying procedures	Reprimand/1500
§663.21(3)	Failure to place and describe record monuments or physical monuments called for in the description prepared for a Political Subdivision	Reprimand/1500
§663.21(4)	Failure to perform an on the ground survey for any course and distance recited in the description when such is not referenced in a recited record	Reprimand/1500
§663.21(5)	Failure to place the required notation on descriptions prepared for Political Subdivisions	Reprimand/1500

Figure: 30 TAC §350.3(4)



Remedy Standard B Reporting

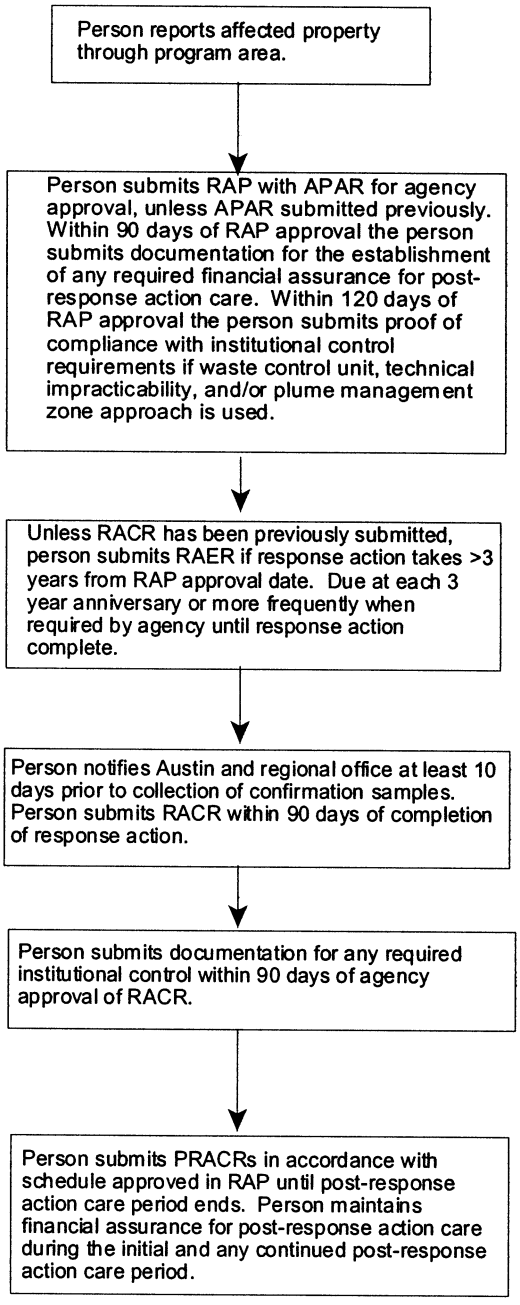


Figure: 30 TAC §350.51(m)

Texas-Specific Soil Background Concentrations milligrams per kilogram (mg/kg)[1]	
Metal	Median Background Concentration (mg/kg)
Aluminum	30,000
Antimony	1
Arsenic	5.9
Barium	300
Beryllium	1.5
Boron	30
Total Chromium	30
Cobalt	7
Copper	15
Flouride	190
Iron	15,000
Lead	15
Manganese	300
Mercury	0.04
Nickel	10
Selenium	0.3
Strontium	100
Tin	0.9
Titanium	2,000
Thorium	9.3
Vanadium	50
Zinc	30

[1] Source: "Background Geochemistry of Some Rocks, Soils, Plants, and Vegetables in the Conterminous United States", by Jon J. Connor, Hansford T. Shacklette, et al., Geological Survey Professional Paper 574-F, US Geological Survey.

Figure: 30 TAC §350.73(e)

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abs} (g soil/g D.W.)	Br_{Bs} (g soil/g D.W.)
1	Acenaphthene	s	83-32-9	O	154.21	6.44E-03	3.60	------	4.21E-02	7.69E-06	4.24E+00	3.75E-03	4.15		
2	Acenaphthylene	s	208-96-8	O	152.20	4.74E-03	3.84	------	4.39E-02	7.07E-06	3.93E+00	2.90E-02	3.94		
3	Acetaldehyde	g	75-07-0	O	44.05	2.75E-03	0.42	------	1.24E-01	1.23E-05	1.00E+06	9.00E+02	0.43		
4	Acetone	l	67-64-1	O	58.08	1.61E-03	-0.24	------	1.24E-01	1.14E-05	6.00E+05	2.27E+02	-0.24		
5	Acetone cyanohydrin	l	75-86-5	O	85.11	1.34E-04	-0.22	------	8.12E-02	9.09E-06	1.83E+06	8.00E-01	-0.03		
6	Acetonitrile	l	75-05-8	O	41.05	1.21E-03	-0.33	------	1.28E-01	1.45E-05	2.05E+05	9.00E+01	-0.34		
7	Acetophenone	l	98-86-2	O	120.15	4.45E-04	1.56	------	6.00E-02	8.73E-06	5.50E+03	3.95E-01	1.67		
8	Acifluorfen, sodium	s	62476-59-9	O	383.64	< 8.31E-13	2.05	------	1.45E-02	4.40E-06	> 2.50E+05	< 9.75E-09	0.37		
9	Acrolein	l	107-02-8	O	56.06	1.83E-04	-0.28	------	1.05E-01	1.12E-05	2.00E+05	2.65E+02	-0.10		
10	Acrylamide	s	79-06-1	O	71.08	1.33E-08	-0.66	------	9.70E-02	1.28E-05	2.20E+06	7.00E-03	-0.81		
11	Acrylic acid	l	79-10-7	O	72.06	1.32E-05	0.05	------	9.08E-02	1.06E-05	1.00E+06	3.72E+00	0.44		
12	Acrylonitrile	l	107-13-1	O	53.06	4.57E-03	0.04	------	1.22E-01	1.34E-05	7.50E+04	1.10E+02	0.21		
13	Alachlor	s	15972-60-8	O	269.77	8.62E-07	2.28	------	1.94E-02	5.83E-06	2.40E+02	2.20E-05	3.37		
14	Aldicarb	s	116-06-3	O	190.27	5.82E-08	1.20	------	3.05E-02	7.20E-06	6.00E+03	2.90E-05	1.36		
15	Aldicarb sulfone	s	1646-88-4	O	222.27	1.10E-07	0.23	------	5.55E-02	5.79E-06	8.00E+03	9.00E-05	-0.67		
16	Aldrin	s	309-00-2	O	364.91	7.07E-03	4.68	------	1.32E-02	4.86E-06	7.84E-02	1.67E-05	6.75		
17	Allyl alcohol	l	107-18-6	O	58.08	2.08E-04	0.51	------	1.14E-01	1.10E-05	3.20E+05	2.63E+01	0.17		
18	Allyl chloride	l	107-05-1	O	76.53	4.57E-01	1.43	------	9.80E-02	1.08E-05	3.40E+03	3.60E+02	1.93		
19	Aluminum	s	7429-90-5	M	26.98	0.00E+00		2.55	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.33	1.5E-03	6.50E-04
20	Aminopyridine, 4-	s	504-24-5	O	94.12	2.44E-07	-0.32	------	8.02E-02	1.08E-05	7.66E+04	2.00E-03	-0.11		
21	Ammonia	g	7664-41-7	I	17.03	1.36E-02	0.49	------	2.59E-01	6.93E-05	5.31E+05	7.47E+03	0.23		
22	Ammonium sulfamate	s	7773-06-0	I	114.13	0.00E+00	-------	CE	9.81E-02	1.04E-05	2.00E+06	0.00E+00	-4.34		
23	Aniline	l	62-53-3	O	93.13	5.82E-05	0.96	------	7.00E-02	8.30E-06	3.60E+04	6.69E-01	1.08		
24	Anthracene	s	120-12-7	O	178.23	4.61E-03	4.37	------	3.24E-02	7.74E-06	4.34E-02	2.55E-05	4.35		
25	Antimony		7440-36-0	M	121.75	0.00E+00	-------	1.65	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	7.0E-02	3.00E-02
26	Aramite	l	140-57-8	O	334.86	CE	4.00	------	4.23E-02	4.45E-06	CE	1.23E-04	4.82		
27	Aroclor 1016	l	12674-11-2	O	257.55	2.27E-02	4.87	------	2.05E-02	6.80E-06	4.20E-01	7.12E-04	5.69		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	$LogK_{oc}$	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abs} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
28	Aroclor 1254	L	11097-69-1	O	327.00	1.12E-01	5.72	------	CE	5.60E-06	3.45E-02	8.82E-05	5.61		
29	Arsenic	s	7440-38-2	M	74.92	0.00E+00	--------	1.40	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.68	1.00E-02	8.00E-03
30	Arsine	g	7784-42-1	I	77.95	2.41E-01	--------	CE	CE	CE	2.00E+05	1.13E+04	CE		
31	Asbestos	s	1332-21-4	I	varies	0.00E+00	-------	5.00	CE	CE	0.00E+00	0.00E+00	CE		
32	Atrazine	s	1912-24-9	O	215.69	1.09E-07	2.20	------	5.64E-02	5.58E-06	3.00E+01	3.00E-07	2.82		
33	Barium	s	7440-39-3	M	137.33	0.00E+00	-------	1.04	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	4.9E-02	1.50E-02
34	Barium cyanide	s	542-62-1	I	189.37	CE	-------	1.78	CE	CE	8.00E+05	CE	CE	4.9E-02	1.50E-02
35	Benzene	l	71-43-2	O	78.11	2.27E-01	1.82	------	8.80E-02	9.80E-06	1.77E+03	9.50E+01	1.99		
36	Benzenethiol	l	108-98-5	O	110.18	1.83E-02	1.32	------	7.60E-02	8.68E-06	7.60E+02	2.40E+00	2.69		
37	Benzidine	s	92-87-5	O	184.24	1.62E-09	1.32	------	3.40E-02	1.50E-05	5.20E+02	8.36E-08	1.34		
38	Benzo-a-anthracene	s	56-55-3	O	228.29	1.39E-04	5.55	------	5.10E-02	9.00E-06	1.00E-02	1.54E-07	5.52		
39	Benzo-a-pyrene	s	50-32-8	O	252.32	4.70E-05	5.98	------	4.30E-02	9.00E-06	1.62E-03	4.89E-09	6.11		
40	Benzo-b-fluoranthene	s	205-99-2	O	252.32	4.99E-04	6.08	------	2.26E-02	5.56E-06	1.50E-03	8.06E-08	6.11		
41	Benzo-j-fluoranthene	s	205-82-3	O	252.32	4.63E-04	5.72	------	4.15E-02	5.48E-06	2.50E-03	8.39E-08	6.11		
42	Benzo-k-fluoranthene	s	207-08-9	O	252.32	4.45E-07	6.09	------	2.26E-02	5.56E-06	5.50E-04	9.59E-11	6.11		
43	Benzo-(g,h,i)-perylene	s	191-24-2	O	276.34	5.82E-06	6.20	------	4.90E-02	5.65E-05	2.60E-04	1.00E-10	6.70		
44	Benzoic acid	s	65-85-0	OA	122.12	1.39E-05	-0.30	------	5.36E-02	7.97E-06	3.50E+03	6.51E-03	1.87		
45	Benzotrichloride	l	98-07-7	O	195.48	2.03E-02	3.16	------	5.91E-02	7.02E-06	1.00E+02	1.90E-01	3.90		
46	Benzyl alcohol	l	100-51-6	O	108.14	1.62E-05	1.08	------	8.00E-02	8.00E-06	4.00E+04	1.06E-01	1.08		
47	Benzyl chloride	l	100-44-7	O	126.59	1.66E-02	2.26	------	7.50E-02	7.80E-06	4.93E+02	1.20E+00	2.79		
48	Beryllium	s	7440-41-7	M	9.01	0.00E+00	-------	1.36	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.57	3.60E-03	1.50E-03
49	Biphenyl, 1,1-	s	92-52-4	O	154.21	1.25E-02	3.71	------	5.73E-02	6.71E-06	7.50E+00	2.94E-02	3.76		
50	Bis (2-chloro-ethyl) ether	l	111-44-4	O	143.01	8.90E-04	1.19	------	6.92E-02	7.53E-06	1.02E+04	1.34E+00	1.56		
51	Bis (2-chloroisopropyl) ether	l	108-60-1	O	171.07	4.16E-03	2.50	------	6.00E-02	6.40E-06	1.70E+03	8.50E-01	2.58		
52	Bis (2-chloromethyl) ether	l	542-88-1	O	114.96	4.99E-03	0.08	------	8.32E-02	9.59E-06	3.80E+04	3.00E+01	0.58		
53	Bis (2-ethyl-hexyl) phthalate	l	117-81-7	O	390.56	4.57E-04	5.83	------	3.51E-02	3.66E-06	3.00E-01	6.45E-06	8.39		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abg} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
54	Bis (tri-n-butyltin) oxide	l	56-35-9	O	596.11	2.08E-03	CE	------	CE	CE	1.80E+01	6.91E-05	5.80		
55	Bromodichloromethane	l	75-27-4	O	163.83	1.32E-01	1.74	------	2.98E-02	1.06E-05	4.50E+03	5.84E+01	1.61		
56	Bromoform	l	75-25-2	O	252.73	2.56E-02	1.94	------	1.49E-02	1.03E-05	3.20E+03	5.60E+00	1.79		
57	Bromomethane	g	74-83-9	O	94.94	5.90E-01	1.02	------	7.28E-02	1.21E-05	1.52E+04	1.64E+03	1.18		
58	Butadiene, 1,3-	g	106-99-0	O	54.09	2.61E+00	2.11	------	1.79E-01	1.02E-05	7.35E+02	2.11E+03	2.03		
59	Butanol, n-	l	71-36-3	O	74.12	3.55E-04	0.77	------	8.00E-02	9.30E-06	7.47E+04	6.54E+00	0.84		
60	Butylate	l	2008-41-5	O	217.38	3.50E-03	2.10	------	4.89E-02	5.14E-06	4.60E+01	1.30E-02	3.85		
61	Butyl benzyl phthalate	l	85-68-7	O	312.37	7.94E-05	4.14	------	1.74E-02	4.83E-06	2.90E+00	1.20E-05	4.84		
62	Cacodylic acid	s	75-60-5	O	138.00	0.00E+00	0.38	------	CE	CE	2.00E+06	0.00E+00	0.00		
63	Cadmium	s	7440-43-9	M	112.41	0.00E+00	-------	1.18	0.00E+00	0.00E+00	0.00E+00	0.00E+00	-0.07	1.40E-01	6.40E-02
64	Calcium cyanide	s	592-01-8	I	92.11	CE	-------	CE	CE	CE	CE	CE	-2.41		
65	Captan	s	133-06-2	O	300.59	2.99E-04	3.81	------	1.83E-02	4.90E-06	5.00E-01	7.50E-06	1.84		
66	Carbaryl	s	63-25-2	O	201.22	5.32E-07	2.37	------	2.78E-02	5.60E-06	3.00E+01	1.36E-06	2.35		
67	Carbazole	s	86-74-8	O	167.21	3.38E-03	3.39	------	3.90E-02	7.03E-06	7.21E-01	2.66E-04	3.23		
68	Carbofuran	s	1563-66-2	O	221.26	1.62E-07	1.46	------	5.35E-02	5.40E-06	7.00E+02	8.30E-06	2.30		
69	Carbosulfan	l	55285-14-8	O	380.55	2.15E-05	4.41	------	3.76E-02	3.88E-06	3.00E-01	3.10E-07	5.57		
70	Carbon disulfide	l	75-15-0	O	76.14	6.13E-01	1.72	------	1.04E-01	1.00E-05	2.30E+03	3.40E+02	1.94		
71	Carbon tetrachloride	l	56-23-5	O	153.82	1.20E+00	2.27	------	7.80E-02	8.80E-06	8.05E+02	1.12E+02	2.44		
72	Chloral	l	75-87-6	O	147.39	2.66E-05	0.80	------	3.85E-02	9.70E-06	8.30E+06	3.50E+01	1.19		
73	Chlordane	s	57-74-9	O	409.78	2.02E-03	5.08	------	1.18E-02	4.37E-06	5.60E-02	1.00E-05	6.60		
74	Chlorfenvinphos	l	470-90-6	O	359.57	2.31E-08	3.11	------	CE	CE	1.45E+02	1.70E-07	4.15		
75	Chlorine	g	7782-50-5	I	70.91	2.86E+00	-------	CE	1.20E-01	1.48E-05	7.00E+03	5.17E+03	0.85		
76	Chlorine cyanide	g	506-77-4	O	61.47	1.12E-01	-------	CE	1.20E-01	1.39E-05	3.00E+04	1.00E+03	-0.38		
77	Chloroanaline, p-	s	106-47-8	O	127.57	4.86E-05	1.82	------	4.83E-02	1.01E-05	3.90E+03	2.35E-02	1.72		
78	Chlorobenzene	l	108-90-7	O	112.56	1.82E-01	2.33	------	7.30E-02	8.70E-06	5.02E+02	1.21E+01	2.64		
79	Chlorobenzilate	s	510-15-6	O	325.19	3.78E-06	2.90	------	8.00E-02	8.00E-06	1.30E+01	2.20E-06	3.99		
80	Chloro-1,3-butadiene, 2-	l	126-99-8	O	88.54	1.33E+00	2.00	------	1.00E-01	1.00E-05	6.30E+02	2.12E+02	2.53		
81	Chlorodifluoromethane	g	75-45-6	O	86.47	1.22E+00	0.79	------	1.13E-01	1.32E-05	2.90E+03	7.83E+03	0.89		
82	Chloroethane	l	75-00-3	O	64.51	2.12E-01	1.25	------	1.50E-01	1.18E-05	2.00E+04	1.20E+03	1.58		
83	Chloroform	l	67-66-3	O	119.38	1.53E-01	1.67	------	1.04E-01	1.00E-05	7.92E+03	1.98E+02	1.52		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abs} (g soil/g D.W.)	Br_{Bz} (g soil/g D.W.)
84	Chloromethane	g	74-87-3	O	50.49	1.44E+00	0.78	——	1.26E-01	6.50E-06	7.25E+03	3.77E+03	1.09		
85	Chloronaphthalene, 2-	s	91-58-7	O	162.62	2.54E-02	3.93	——	6.18E-02	6.98E-06	6.74E+00	1.70E-02	3.81		
86	Chlorophenol, 2-	l	95-57-8	OA	128.56	7.40E-04	2.46	——	5.01E-02	9.46E-06	2.80E+04	1.42E+00	2.16		
87	Chlorotoluene, 2-	l	95-49-8	O	126.59	1.35E-01	2.61	——	7.01E-02	———	1.54E+02	3.9E-03	3.20		
88	Chlorpyrifos	s	2921-88-2	O	350.59	1.73E-04	3.70	——	4.85E-02	5.11E-06	9.00E-01	1.87E-05	4.66		
89	Chromium (III)/Chromium (total)	s	7440-47-3	M	52.00	0.00E+00	———	3.08	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	5.20E-03	4.50E-03
90	Chromium (VI)	s	18540-29-9	M	52.00	0.00E+00	———	1.15	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	5.20E-03	4.50E-03
91	Chrysene	s	218-01-9	O	228.29	5.03E-05	5.49	———	2.48E-02	6.21E-06	2.00E-03	7.80E-09	5.52		
92	Cobalt	s	7440-48-4	M	58.93	0.00E+00	———	1.65	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	1.00E-02	7.00E-03
93	Copper	s	7440-50-8	M	63.55	0.00E+00	———	1.60	0.00E+00	0.00E+00	0.00E+00	0.00E+00	-0.57	2.90E-01	2.50E-01
94	Copper cyanide	s	544-92-3	I	115.58	CE	———	1.54	CE	CE	0.00E+00	0.00E+00	-1.49	2.90E-01	2.50E-01
95	Cresol, m-	l	108-39-4	O	108.14	3.62E-05	1.94	———	7.40E-02	1.00E-05	2.30E+04	1.40E-01	2.06		
96	Cresol, o-	s	95-48-7	O	108.14	6.65E-05	1.99	———	7.40E-02	8.30E-06	2.04E+04	3.20E-01	2.06		
97	Cresol, p-	s	106-44-5	O	108.14	3.99E-05	1.91	———	7.40E-02	1.00E-05	2.30E+04	1.30E-01	2.06		
98	Crotonaldehyde	l	123-73-9	O	70.09	8.15E-04	0.21	———	9.37E-02	1.02E-05	1.60E+05	1.90E+01	0.60		
99	Cumene	l	98-82-8	O	120.19	6.07E-01	3.54	———	6.50E-02	7.10E-06	5.00E+01	4.60E+00	3.45		
100	Cyanide	CE	57-12-5	I	26.02	CE	———	1.00	5.21E-01	2.28E-05	1.00E+05	1.38E+01	-0.69		
101	Cyanogen	g	460-19-5	O	52.04	2.06E-01	0.13	———	2.04E-01	1.37E-05	1.00E+04	3.88E+03	0.07		
102	Cyanogen bromide	s	506-68-3	O	105.92	4.41E+02	-0.49	———	6.24E-02	1.13E-05	1.31E+00	1.00E+02	-0.29		
103	Cyclohexanone	l	108-94-1	O	98.14	4.99E-04	0.74	——	7.72E-02	8.73E-06	2.30E+04	4.00E+00	1.13		
104	Cyclotrimethylenetrinitramine	s	121-82-4	O	222.12	4.99E-04	1.80	———	6.65E-02	6.39E-06	3.87E+01	1.00E-09	0.87		
105	DDD	s	72-54-8	O	320.05	1.66E-04	4.93	——	1.69E-02	4.76E-06	9.00E-02	8.66E-07	5.87		
106	DDE	s	72-55-9	O	241.93	8.73E-04	5.04	———	1.44E-02	5.87E-06	6.50E-02	5.66E-06	6.00		
107	DDT	s	50-29-3	O	354.49	2.23E-03	5.14	———	1.37E-02	4.95E-06	3.10E-03	3.93E-07	6.79		
108	Di-n-butyl phthalate	l	84-74-2	O	278.35	5.94E-05	4.53	———	4.38E-02	7.86E-06	1.12E+01	4.25E-05	4.61		
109	Di-n-octyl phthalate	l	117-84-0	O	390.56	2.78E-03	7.92	——	1.51E-02	3.90E-06	2.00E-02	4.47E-06	8.54		
110	Diallate	s	2303-16-4	O	270.22	1.58E-04	3.28	———	8.00E-02	8.00E-06	1.40E+01	1.50E-04	4.08		
111	Diazinon	l	333-41-5	O	304.35	4.70E-06	2.12	——	1.80E-02	4.90E-06	4.00E+01	8.40E-05	3.86		

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112	Dibenz-a,h-anthracene	s	53-70-3	O	278.35	4.66E-07	6.28	----	2.00E-02	5.18E-06	5.00E-04	2.10E-11	6.70		
113	Dibromo-3-chloropropane, 1,2-	l	96-12-8	O	236.33	8.31E-03	2.23	----	8.00E-02	8.00E-06	1.00E+03	7.60E-01	2.68		
114	Dibromochloromethane	l	124-48-1	O	208.28	3.25E-02	1.80	----	1.96E-02	1.05E-05	5.25E+03	1.50E+01	1.70		
115	Dicamba	s	1918-00-9	O	209.03	3.28E-07	0.34	----	6.02E-02	6.69E-06	5.60E+03	9.70E-05	2.14		
116	Dichlorobenzene, 1,2-	l	95-50-1	O	147.00	8.73E-02	2.84	----	6.90E-02	7.90E-06	1.50E+02	1.36E+00	3.28		
117	Dichlorobenzene, 1,3-	l	541-73-1	O	147.00	1.95E-01	2.23	----	6.80E-02	8.13E-06	1.10E+02	2.30E+00	3.28		
118	Dichlorobenzene, 1,4-	s	106-46-7	O	147.00	1.17E-01	2.81	----	6.90E-02	7.90E-06	7.38E+01	1.06E+00	3.28		
119	Dichlorobenzidine, 3,3-	s	91-94-1	O	253.13	8.65E-07	2.86	----	1.94E-02	6.74E-06	3.11E+00	2.20E-07	3.21		
120	Dichloro-2-butene, 1,4	l	764-41-0	O	125.00	1.24E-02	2.26	-----	7.43E-02	8.62E-06	6.91E+03	1.26E+01	2.60		
121	Dichlorodifluoromethane	l	75-71-8	O	120.91	1.67E+01	2.11	----	5.20E-02	1.05E-05	2.80E+02	4.80E+03	1.82		
122	Dichloroethane, 1,1-	l	75-34-3	O	98.96	2.39E-01	1.50	----	7.42E-02	1.05E-05	5.50E+03	2.28E+02	1.76		
123	Dichloroethane, 1,2-	l	107-06-2	O	98.96	5.32E-02	1.24	-----	1.04E-01	9.90E-06	8.70E+03	8.13E+01	1.83		
124	Dichloroethylene, 1,1-	l	75-35-4	O	96.94	1.06E+00	1.81	-----	9.00E-02	1.04E-05	2.40E+03	5.91E+02	2.12		
125	Dichloroethylene, cis-1,2-	l	156-59-2	O	96.94	1.87E-01	1.46	-----	7.35E-02	1.13E-05	4.93E+03	1.75E+02	1.86		
126	Dichloroethylene, trans-1,2	l	156-60-5	O	96.94	3.90E-01	1.70	-----	7.07E-02	1.19E-05	6.30E+03	3.52E+02	2.07		
127	Dichlorophenol, 2,4-	s	120-83-2	OA	163.00	1.31E-04	1.86	-----	3.46E-02	8.77E-06	4.50E+03	7.15E-02	2.80		
128	Dichlorophenoxyacetic acid, 2,4-	s	94-75-7	O	221.04	5.82E-09	2.95	-----	5.90E-02	6.50E-06	8.90E+02	2.40E-05	2.62		
129	Dichloropropane, 1,2	l	78-87-5	O	112.99	1.17E-01	1.77	-----	7.82E-02	8.73E-06	2.80E+03	5.00E+01	2.25		
130	Dichloro-1-propanol, 2,3-	l	616-23-9	O	128.99	3.97E-05	1.53	-----	4.84E-02	9.84E-06	2.95E+05	5.82E-01	0.78		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abg} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
131	Dichloropropene, 1,3-	l	542-75-6	O	110.97	1.23E-01	1.72	------	6.26E-02	1.00E-05	1.55E+03	3.12E+01	1.75		
132	Dichloropropene, 1,3-cis	l	10061-01-5	O	110.97	9.15E-02	1.65	------	7.94E-02	8.00E-06	2.70E+03	3.70E+01	1.53		
133	Dichloropropene, 1,3-trans	l	10061-02-6	O	110.97	9.15E-02	1.65	------	7.94E-02	9.20E-06	2.80E+03	3.00E+01	1.53		
134	Dichlorvos	l	62-73-7	O	220.98	3.98E-05	9.59	------	2.32E-02	7.80E-06	1.60E+04	5.27E-02	1.40		
135	Dieldrin	s	60-57-1	O	380.91	1.11E-04	4.33	------	1.25E-02	4.74E-06	1.95E-01	9.96E-07	5.45		
136	Diethylhexyl adipate	l	103-23-1	O	370.57	9.78E-01	5.58	------	3.56E-02	3.72E-06	1.71E-03	8.25E-05	8.12		
137	Diethyl phthalate	l	84-66-2	O	222.24	1.87E-05	2.18	------	2.56E-02	6.35E-06	1.08E+03	1.65E-03	2.65		
138	Diethylstilbestrol	s	56-53-1	O	268.36	2.62E-13	4.88	------	4.43E-02	8.00E-06	1.30E+04	1.06E-09	5.64		
139	Dimethoate	s	60-51-5	O	229.26	2.58E-09	0.63	------	8.00E-02	8.00E-06	2.50E+04	5.09E-06	0.28		
140	Dimethoxybenzidine, 3,3'-	s	119-90-4	O	244.29	1.66E-08	1.78	------	2.42E-02	5.50E-06	2.40E+02	2.50E-07	2.08		
141	Dimethylbenzidine, 3,3'-	s	119-93-7	O	212.29	5.40E-09	2.30	------	5.10E-02	8.00E-06	2.40E+02	3.70E-07	3.02		
142	Dimethylhydrazine, 1,1-	l	57-14-7	O	60.10	4.16E-06	-0.70	------	1.06E-01	1.04E-05	1.24E+08	1.57E+02	-1.19		
143	Dimethylhydrazine, 1,2-	l	540-73-8	O	60.10	1.72E-04	0.59	------	1.04E-01	1.10E-05	1.18E+07	6.63E+01	-0.54		
144	Dimethyl phenol, 2,4-	s	105-67-9	O	122.17	8.31E-05	2.07	------	5.84E-02	8.69E-06	6.20E+03	1.26E-01	2.61		
145	Dimethyl phthalate	l	131-11-3	O	194.19	2.40E-05	1.50	------	5.68E-02	6.30E-06	4.19E+03	9.12E-03	1.66		
146	Dinitrobenzene, 1,3-	s	99-65-0	O	168.11	4.57E-06	1.48	------	2.80E-01	7.60E-06	5.40E+02	2.49E-04	1.63		
147	Dinitrobenzene, 1,4-	s	100-25-4	O	168.11	4.44E-06	1.42	------	6.15E-02	7.18E-06	1.00E+02	4.83E-05	1.63		
148	Dinitrophenol, 2,4-	s	51-28-5	OA	184.11	2.01E-07	-2.00	------	2.73E-02	9.06E-06	5.80E+03	1.14E-04	1.73		
149	Dinitrotoluene, 2,4-	s	121-14-2	O	182.14	3.60E-05	1.71	------	2.03E-01	7.06E-06	2.85E+02	1.74E-04	2.18		
150	Dinitrotoluene, 2,6-	s	606-20-2	O	182.14	3.11E-05	1.62	------	3.27E-02	7.26E-06	1.82E+02	5.70E-04	2.18		
151	Dinoseb	s	88-85-7	O	240.22	2.08E-02	3.08	------	2.25E-02	6.25E-06	5.20E+01	7.52E-02	3.67		
152	Dioxane, 1,4-	l	123-91-1	O	88.11	2.04E-04	-0.27	------	2.30E-01	1.00E-05	9.00E+05	3.80E+01	-0.32		
153	TCDDioxins, 2,3,7,8-	s	1746-01-6	O	321.97	1.47E-03	7.15	------	4.70E-02	8.00E-06	1.93E-05	7.40E-10	7.02		
154	TCDDioxins, 1,2,3,7-	s	67028-18-6	O	321.97	3.16E-04	5.98	------	4.80E-02	5.28E-06	4.20E-05	5.25E-08	6.91		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	$LogK_{oc}$	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abs} (g soil/g D.W.)	Br_{Bio} (g soil/g D.W.)
155	TCDDioxins, 1,3,6,8-	s	33423-92-6	O	321.97	2.91E-04	4.36	----	4.80E-02	5.28E-06	3.20E-04	5.25E-09	7.20		
156	TCDDioxins, 1,2,3,4-	s	30746-58-8	O	321.97	1.55E-03	CE	----	4.80E-02	5.28E-06	4.70E-04	4.73E-08	7.18		
157	PeCDDioxins, 1,2,3,7,8-	s	40321-76-4	O	356.42	1.08E-04	5.70	----	4.64E-02	5.07E-06	1.20E-04	9.48E-10	7.56		
158	PeCDDioxins, 1,2,3,4,7-	s	39227-61-7	O	356.42	1.08E-04	5.80	----	4.64E-02	5.07E-06	1.20E-04	7.50E-10	7.56		
159	HxCDDioxins, 1,2,3,4,7,8-	s	39227-28-6	O	390.86	1.85E-03	6.02	----	4.49E-02	4.87E-06	4.42E-06	8.80E-11	8.21		
160	HpCDDioxins, 1,2,3,4,6,7,8-	s	35822-46-9	O	425.31	3.12E-04	7.00	----	4.35E-02	4.70E-06	2.40E-06	3.21E-11	8.85		
161	OCDDioxins	s	3268-87-9	O	459.75	2.80E-04	7.08	----	4.30E-02	4.54E-06	4.00E-07	8.25E-13	9.50		
162	Diphenylamine	s	122-39-4	O	169.23	1.83E-04	2.54	----	6.80E-02	6.30E-06	3.00E+02	4.26E-03	3.29		
163	Diphenylhydrazine, 1,2-	s	122-66-7	O	184.24	1.42E-07	2.82	----	5.62E-02	5.70E-06	1.84E+03	2.60E-05	3.06		
164	Diquat dibromide	s	85-00-7	O	344.05	2.69E-12	2.31	----	5.52E-02	5.52E-06	7.00E+05	1.00E-07	-2.82		
165	Disulfoton	s	298-04-4	O	274.41	2.58E-04	3.95	----	8.00E-02	8.00E-06	1.60E+01	2.30E-04	3.86		
166	Diuron	s	330-54-1	O	233.10	3.04E-08	2.63	----	5.40E-02	5.30E-06	4.20E+01	1.00E-07	2.67		
167	Endosulfan	s	115-29-7	O	406.93	4.66E-04	2.87	----	1.15E-02	4.55E-06	5.10E-01	9.96E-06	3.84		
168	Endothall	s	145-73-3	O	230.13	1.08E-08	1.93	----	CE	CE	1.00E+05	1.80E-04	1.89		
169	Endrin	s	72-20-8	O	380.91	4.95E-05	3.97	----	1.25E-02	4.74E-06	2.50E-01	5.84E-07	5.45		
170	Epichlorohydrin	l	106-89-8	O	92.53	1.37E-03	0.30	----	8.60E-02	9.80E-06	6.60E+04	1.67E+01	0.63		
171	Ethion	l	563-12-2	O	384.48	2.87E-05	4.19	----	CE	CE	1.20E+00	1.50E-06	4.75		
172	Ethoxy ethanol, 2-	l	110-80-5	O	90.12	1.04E-05	2.10E-01	----	7.77E-02	8.30E-06	5.29E+05	1.12E+00	1.66E-01		
173	Ethoxyethanol acetate, 2-	l	111-15-9	O	132.16	3.77E-05	0.20	----	6.10E-02	7.29E-06	2.30E+05	2.00E+00	0.59		
174	Ethyl acetate	l	141-78-6	O	88.11	5.57E-03	0.72	----	7.30E-02	9.70E-06	7.90E+04	9.41E+01	0.86		
175	Ethyl acrylate	l	140-88-5	O	100.12	1.06E-02	2.03	----	7.40E-02	8.68E-06	2.00E+04	2.95E+01	1.22		
176	Ethyl benzene	l	100-41-4	O	106.17	3.28E-01	2.31	----	7.50E-02	7.80E-06	1.69E+02	9.60E+00	3.03		
177	S-Ethyl dipropylthiocarbamate	l	759-94-4	O	189.32	4.57E-03	2.38	----	5.35E-02	5.65E-06	3.70E+02	1.60E-01	3.02		
178	Ethyl ether	l	60-29-7	O	74.12	2.70E-02	0.88	----	7.40E-02	9.30E-06	6.10E+04	5.40E+02	1.05		
179	Ethyl methacrylate	l	97-63-2	O	114.14	6.65E-03	1.57	----	8.00E-02	8.00E-06	1.90E+04	1.75E+01	1.77		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H ' (cm^3-H_2O/cm^3-air)	$LogK_{oc}$	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abg} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
180	Ethyl-2-methylbenzene, 1-	l	611-14-3	O	120.19	2.19E-01	3.03	____	6.76E-02	7.29E-06	7.46E+01	2.48E+00	3.53		
181	Ethyl-4-methylbenzene, 1-	l	622-96-8	O	120.19	3.27E-01	3.07	____	6.70E-02	7.18E-06	9.49E+01	2.95E+00	3.58		
182	Ethylenediamine	l	107-15-3	O	60.10	7.19E-08	0.67	------	1.53E-01	1.12E-05	7.95E+06	1.10E+01	-1.62		
183	Ethylene dibromide	l	106-93-4	O	187.86	2.93E-02	1.73	------	2.17E-02	1.90E-05	4.32E+03	1.10E+01	2.01		
184	Ethylene glycol	l	107-21-1	O	62.07	2.49E-06	-0.90	-----	1.08E-01	1.22E-05	1.00E+06	7.00E-02	-1.20		
185	Ethylene oxide	g	75-21-8	O	44.05	4.92E-03	0.34	------	1.04E-01	1.45E-05	3.83E+05	1.32E+03	-0.05		
186	Ethylene thiourea	s	96-45-7	O	102.16	4.99E-05	-0.66	------	7.15E-02	1.02E-05	1.20E+04	8.36E-02	-0.49		
187	Fluoranthene	s	206-44-0	O	202.26	3.88E-04	4.69	------	3.02E-02	6.35E-06	2.60E-01	8.13E-06	4.93		
188	Fluorene	s	86-73-7	O	166.22	2.64E-03	3.88	------	3.63E-02	7.88E-06	1.98E+00	3.24E-03	4.02		
189	Fluorine (soluble Fluoride)	g	7782-41-4	I	38.00	CE	--------	2.18	CE	CE	NA/reacts	7.60E+02	0.22		
190	Formaldehyde	g	50-00-0	O	30.03	1.37E-05	0.34	------	1.80E-01	2.00E-05	5.50E+05	3.88E+03	0.35		
191	Formic acid	l	64-18-6	O	46.03	1.79E-04	-0.54	------	7.90E-02	1.40E-06	1.00E+06	4.10E+01	-0.46		
192	TCDFurans, 2,3,7,8-	s	51207-31-9	O	305.98	6.16E-04	5.20	------	4.86E-02	5.41E-06	4.19E-04	1.50E-08	6.29		
193	PeCDFuran, 1,2,3,7,8-	s	57117-41-6	O	340.42	2.11E-04	6.73	-----	4.69E-02	5.18E-06	2.40E-04	2.72E-09	6.94		
194	PeCDFuran, 2,3,4,7,8-	s	57117-31-4	O	340.42	2.44E-04	7.40	------	4.69E-02	5.18E-06	2.36E-04	2.63E-09	6.94		
195	HxCDFurans, 1,2,3,4,7,8-	s	70648-26-9	O	374.87	5.97E-04	7.40	------	4.50E-02	4.97E-06	8.25E-06	2.40E-10	7.92		
196	HxCDFurans, 1,2,3,6,7,8-	s	57117-44-9	O	374.87	2.54E-04	7.55	-----	4.50E-02	4.97E-06	1.77E-05	2.20E-10	7.92		
197	HxCDFurans, 2,3,4,6,7,8-	s	60851-34-5	O	374.87	1.70E-03	7.54	-----	4.50E-02	4.97E-06	1.30E-05	2.00E-10	7.92		
198	HpCDFurans, 1,2,3,4,6,7,8-	s	67562-39-4	O	409.31	1.54E-03	6.37	-----	4.30E-02	4.79E-06	1.35E-06	3.82E-10	8.23		
199	HpCDFurans, 1,2,3,4,7,8,9-	s	55673-89-7	O	409.31	1.58E-03	5.00	------	4.30E-02	4.79E-06	1.40E-06	1.07E-10	6.90		
200	OCDFurans	s	39001-02-0	O	443.76	7.90E-05	6.75	-----	4.27E-02	4.62E-06	1.20E-06	3.75E-12	8.87		
201	Furan	l	110-00-9	O	68.08	2.24E-01	1.32	------	1.04E-01	1.20E-05	1.00E+04	6.00E+02	1.36		
202	Fufural	l	98-01-1	O	96.09	1.25E-04	0.44	------	8.72E-02	1.12E-05	8.60E+04	2.00E+00	0.83		
203	Glycidylaldehyde	l	765-34-4	O	72.06	1.08E-05	0.96	------	9.64E-02	1.16E-05	8.55E+07	2.70E+01	-0.12		
204	Heptachlor	s	76-44-8	O	373.32	2.44E-02	4.07	------	1.12E-02	5.69E-06	1.80E-01	3.26E-04	6.21		
205	Heptachlor epoxide	s	1024-57-3	O	389.32	3.45E-04	3.86	------	1.32E-02	4.23E-06	2.75E-01	4.34E-06	4.91		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H ' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abr} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
206	Hexachlorobenzene	s	118-74-1	O	284.78	2.22E-02	4.45	------	5.42E-02	5.91E-06	6.00E-03	1.23E-05	5.86		
207	Hexachloro-1,3-butadiene	l	87-68-3	O	260.76	9.94E-01	3.84	------	5.61E-02	6.16E-06	2.55E+00	1.77E-01	4.72		
208	Hexachlorocyclohexane, techn	CE	608-73-1	O	290.83	5.99E-05	3.38	------	1.42E-02	7.34E-06	4.35E+01	1.64E-04	4.26		
209	Hexachlorocyclohexane, alpha	s	319-84-6	O	290.83	2.82E-04	3.12	------	1.42E-02	7.34E-06	2.00E+00	4.26E-05	4.26		
210	Hexachlorocyclohexane, beta	s	319-85-7	O	290.83	1.44E-05	3.14	------	1.42E-02	7.34E-06	5.42E-01	4.90E-07	4.26		
211	Hexachlorocyclohexane, gamma	s	58-89-9	O	290.83	1.41E-04	3.04	------	1.42E-02	7.34E-06	5.75E+00	3.72E-05	4.26		
212	Hexachlorocyclopentadiene	l	77-47-4	O	273.78	7.15E-01	3.98	------	1.61E-02	7.21E-06	1.80E+00	7.32E-02	4.63		
213	Hexachloroethane	s	67-72-1	O	236.74	1.62E-01	3.26	------	2.50E-03	6.80E-06	5.00E+01	4.72E-01	4.03		
214	Hexachlorophene	s	70-30-4	O	406.91	2.54E-09	7.30	------	8.00E-02	8.00E-06	3.00E-03	2.74E-12	6.92		
215	Hexane, n-	l	110-54-3	O	86.18	4.66E+01	2.68	------	2.00E-01	7.77E-06	1.30E+01	1.52E+02	3.29		
216	Hexazinone	s	51235-04-2	O	252.32	8.62E-11	1.57	------	5.08E-02	5.11E-06	3.30E+04	2.03E-07	2.15		
217	Hydrazine	l	302-01-2	O	32.05	7.20E-08	-1.00	------	4.16E-01	1.90E-05	3.41E+08	1.40E+01	-1.47		
218	Hydrogen chloride	g	7647-01-0	I	36.46	9.30E-02	--------	CE	1.67E-01	2.05E-05	6.60E+05	3.08E+04	0.54		
219	Hydrogen cyanide	g	74-90-8	I	27.03	5.40E-03	--------	CE	1.73E-01	1.96E-05	1.00E+06	6.20E+02	-0.69		
220	Hydrogen sulfide	g	7783-06-4	I	34.08	9.56E-01	--------	CE	1.76E-01	1.61E-05	4.13E+03	1.52E+04	0.23		
221	Indene	l	95-13-6	O	116.16	2.08E-02	2.50	------	6.82E-02	7.97E-06	3.90E+02	1.30E+00	2.80		
222	Indeno-(1,2,3-cd)-pyrene	s	193-39-5	O	276.34	2.85E-06	6.54	------	1.90E-02	5.66E-06	3.75E-03	1.40E-10	6.70		
223	Isobutyl alcohol	l	78-83-1	O	74.12	4.99E-04	0.75	------	8.60E-02	8.00E-06	9.49E+04	1.00E+01	0.77		
224	Isophorone	l	78-59-1	O	138.21	2.57E-04	1.48	------	6.23E-02	6.76E-06	1.20E+04	4.10E-01	2.62		
225	Kepone	s	143-50-0	O	490.64	1.04E-06	4.43	------	4.22E-02	4.30E-06	7.60E+00	2.25E-07	4.91		
226	Lead	s	7439-92-1	M	207.20	0.00E+00	--------	1.00	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.73		
227	Malathion	l	121-75-5	O	330.36	9.98E-07	2.46	------	1.50E-02	4.40E-06	1.45E+02	7.90E-06	2.29		
228	Maleic anhydride	s	108-31-6	O	98.06	8.31E-06	1.41	------	9.50E-02	1.11E-05	8.65E+02	1.34E-03	1.62		
229	Maleic hydrazide	s	123-33-1	O	112.09	< 1.03E-10	1.40	------	8.75E-02	8.75E-06	6.00E+03	< 7.50E-08	-0.89		
230	Malononitrile	s	109-77-3	O	66.06	1.97E-07	0.69	------	9.97E-02	1.09E-05	6.96E+06	3.79E-01	-0.18		
231	Manganese	s	7439-96-5	M	54.94	0.00E+00	--------	1.70	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	1.00E-01	5.00E-02
232	Mercury	l	7439-97-6	M	200.59	4.74E-01	--------	-1.40	3.07E-02	6.30E-06	3.00E-02	1.30E-03	-0.47	5.50E-03	1.40E-02
233	Methacrylonitrile	l	126-98-7	O	67.09	3.03E-03	0.53	------	8.00E-02	8.00E-06	2.50E+04	6.80E+01	0.76		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abg} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
234	Methanol	l	67-56-1	O	32.04	1.94E-04	-0.74	------	1.50E-01	1.64E-05	1.00E+06	1.22E+02	-0.63		
235	Methomyl	s	16752-77-5	O	162.21	7.48E-09	2.20	------	4.07E-02	7.20E-06	5.80E+04	5.00E-05	0.61		
236	Methoxychlor	s	72-43-5	O	345.65	6.57E-04	4.89	------	1.56E-02	4.46E-06	4.50E-02	1.23E-06	5.67		
237	Methoxyethanol	l	109-86-4	O	76.10	1.28E+00	0.93	------	9.15E-02	1.02E-05	2.01E+01	6.20E+00	-0.91		
238	Methoxyethanol acetate	l	110-49-6	O	118.13	1.28E+00	1.40	------	7.22E-02	8.10E-06	3.52E+01	7.00E+00	0.10		
239	Methyl ethyl ketone	l	78-93-3	O	72.11	1.94E-03	0.28	------	8.08E-02	9.80E-06	2.40E+05	9.10E+01	0.26		
240	Methyl isobutyl ketone	l	108-10-1	O	100.16	5.82E-03	1.18	------	7.50E-02	7.80E-06	1.90E+04	1.45E+01	1.16		
241	Methyl mercury	CE	22967-92-6	I	215.62	CE	--------	CE	CE	CE	CE	CE	0.08		
242	Methyl methacrylate	l	80-62-6	O	100.12	1.33E-02	1.36	------	7.70E-02	8.60E-06	1.60E+04	3.80E+01	1.28		
243	Methyl naphthalene, 1-	s	90-12-0	O	142.20	1.64E-02	3.36	------	6.31E-02	7.13E-06	2.80E+01	6.62E-02	3.72		
244	Methyl naphthalene, 2-	s	91-57-6	O	142.20	1.85E-02	3.64	------	6.29E-02	7.20E-06	2.54E+01	6.75E-02	3.72		
245	Methyl parathion	s	298-00-0	O	263.21	5.82E-06	2.81	------	8.00E-02	8.00E-06	5.00E+01	1.52E-05	2.75		
246	Methylene-bis (2-chloroaniline), 4,4'-	s	101-14-4	O	267.16	1.40E-05	3.90	------	1.99E-02	5.80E-06	7.24E+01	6.94E-05	3.47		
247	Methylene bromide	l	74-95-3	O	173.83	3.49E-02	2.26	------	8.00E-02	8.00E-06	1.10E+04	4.56E+01	1.52		
248	Methylene chloride	l	75-09-2	O	84.93	9.10E-02	1.07	------	1.01E-01	1.17E-05	1.54E+04	4.55E+02	1.34		
249	Molinate	l	2212-67-1	O	187.31	5.25E-05	1.70	------	5.65E-02	6.00E-06	9.00E+02	5.60E-03	2.91		
250	Molybdenum	s	7439-98-7	M	95.94	0.00E+00	--------	1.30	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	1.00E-01	6.00E-02
251	MTBE	l	1634-04-4	O	88.15	2.44E-02	1.15	------	7.92E-02	9.41E-05	4.80E+04	2.49E+02	1.43		
252	Naled	l	300-76-5	O	380.78	2.71E-03	2.12	------	CE	6.80E-06	1.50E+00	2.00E-04	1.60		
253	Naphthalene	s	91-20-3	O	128.17	2.00E-02	3.19	------	5.90E-02	7.50E-06	3.14E+01	8.89E-02	3.17		
254	Nickel and compounds (soluble salts)	s	7440-02-0	M	58.69	0.00E+00	--------	1.20	0.00E+00	0.00E+00	0.00E+00	0.00E+00	-0.57	2.50E-02	8.00E-03
255	Nickel, refinery dust	CE	No CASNUM	I	CE	CE	--------	CE	CE	CE	CE	CE	CE	2.50E-02	8.00E-03
256	Nitrate	CE	14797-55-8	I	62.00	CE	--------	CE	CE	CE	CE	CE	0.21		
257	Nitrite	CE	14797-65-0	I	46.01	CE	--------	CE	CE	CE	CE	CE	0.06		
258	Nitroaniline 2-	s	88-74-4	O	138.13	2.08E-05	1.43	------	5.99E-02	7.18E-06	1.26E+03	4.75E-03	2.02		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H ' (cm^3-H_2O/cm^3-air)	$LogK_{oc}$	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abr} (g soil/g D.W.)	Br_{Bz} (g soil/g D.W.)
259	Nitrobenzene	l	98-95-3	O	123.11	8.56E-04	2.12	------	7.60E-02	8.60E-06	1.90E+03	2.44E-01	1.81		
260	Nitropropane, 2-	l	79-46-9	O	89.09	5.15E-03	0.54	------	9.23E-02	1.01E-05	1.70E+04	1.82E+01	0.87		
261	Nitroso-n-ethylurea, n-	s	759-73-9	O	117.11	1.05E-04	1.51	------	8.08E-02	8.25E-06	4.85E+04	7.97E-01	-0.02		
262	Nitroso-n-methylurea, n-	CE	684-93-5	O	103.08	1.08E-06	1.23	------	7.06E-02	1.02E-05	4.21E+06	8.04E-01	-0.52		
263	Nitroso-methyl-ethyl-amine, n-	CE	10595-95-6	O	88.11	3.70E-05	1.32	------	8.00E-02	8.00E-06	3.00E+05	2.28E+00	-0.15		
264	Nitrosodi-n-butylamine, n-	CE	924-16-3	O	158.24	3.58E-03	2.36	------	8.00E-02	8.00E-06	1.20E+03	2.89E-01	2.31		
265	Nitrosodi-n-propylamine, n-	s	621-64-7	O	130.19	9.35E-05	1.30	------	5.45E-02	8.17E-06	9.89E+03	4.00E-01	1.35		
266	Nitrosodiethanolamine	l	1116-54-7	O	134.14	2.05E-09	0.48	------	7.27E-02	7.70E-06	7.33E+07	5.00E-04	-1.28		
267	Nitrosodiethylamine, N-	l	55-18-5	O	102.14	3.60E-05	0.48	------	8.00E-02	8.00E-06	1.47E+05	1.42E+00	0.34		
268	Nitrosodimethylamine, N-	l	62-75-9	O	74.08	2.16E-05	0.56	------	1.34E-01	9.72E-06	1.00E+06	5.37E+00	-0.64		
269	Nitrosodiphenylamine	s	86-30-6	O	198.22	2.08E-04	2.52	------	3.12E-02	6.35E-06	3.51E+01	9.88E-02	3.16		
270	Nitrosopyrrolidine, n-	l	930-55-2	O	100.12	7.48E-07	-0.19	------	8.00E-02	8.00E-06	7.80E+05	1.75E-01	0.23		
271	Nitrotoluene, m	l	99-08-1	O	137.14	2.24E-03	2.15	------	6.42E-02	7.69E-06	4.98E+02	1.50E-01	2.36		
272	Nitrotoluene, o	l	88-72-2	O	137.14	1.87E-03	2.15	------	6.47E-02	7.73E-06	6.00E+02	1.50E-01	2.36		
273	Nitrotoluene, p	s	99-99-0	O	137.14	2.29E-03	2.15	------	6.40E-02	7.70E-06	4.00E+02	1.20E-01	2.36		
274	Octamethylpryrophosphoramide	l	152-16-9	O	286.25	1.16E-08	-0.51	------	8.00E-02	8.00E-06	1.00E+06	9.88E-04	-1.01		
275	Oxamyl	s	23135-22-0	O	219.26	1.60E-11	0.70	------	5.57E-02	5.75E-06	2.80E+05	3.83E-07	-1.20		
276	Parathion	s	56-38-2	O	291.26	2.37E-05	3.75	------	1.70E-02	5.80E-06	1.18E+01	1.73E-05	3.73		
277	Pebulate	l	1114-71-2	O	203.35	9.85E-04	2.63	------	5.10E-02	5.38E-06	9.20E+01	8.85E-03	3.51		
278	Pentachlorobenzene	s	608-93-5	O	250.34	3.16E-02	4.50	------	6.70E-02	6.30E-06	6.50E-01	1.67E-03	5.22		
279	Pentachloronitrobenzene	s	82-68-8	O	295.34	2.57E-02	4.11	------	1.59E-02	6.10E-06	7.11E-02	1.13E-04	5.03		
280	Pentachlorophenol	s	87-86-5	OA	266.34	1.16E-05	2.61	------	5.60E-02	6.10E-06	1.40E+01	1.70E-05	4.74		
281	Phenanthrene	s	85-01-8	O	178.23	5.40E-03	4.15	------	3.33E-02	7.47E-06	9.94E-01	6.80E-04	4.35		

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282	Phenol	s	108-95-2	O	94.11	2.47E-05	1.24	------	8.20E-02	9.10E-06	8.70E+04	4.63E-01	1.51		
283	Phenyl mercuric acetate	s	62-38-4	O	336.74	3.41E-09	2.20	------	8.00E-02	8.00E-06	4.37E+03	3.04E-06	0.89		
284	Phenylene diamine, m-	s	108-45-2	O	108.14	9.56E-07	0.04	------	6.63E-02	9.90E-06	3.51E+05	2.28E-02	-0.39		
285	Phenylene diamine, p-	s	106-50-3	O	108.14	5.24E-08	0.04	------	7.15E-02	8.92E-06	3.80E+04	4.60E-03	-0.39		
286	Phorate	l	298-02-2	O	260.38	4.99E-04	3.74	------	8.00E-02	8.00E-06	4.40E+01	1.30E-03	3.37		
287	Phosphine	g	7803-51-2	I	34.00	1.46E+02	--------	CE	3.81E-01	1.82E-05	4.00E+02	3.14E+04	-0.27		
288	Phosphoric acid	s	7664-38-2	I	98.00	CE	--------	CE	CE	CE	CE	3.00E-02	-0.77		
289	Phosphorus, white	s	7723-14-0	I	123.90	5.65E-02	3.05	------	CE	CE	3.00E+00	2.50E-02	3.08		
290	Phthalic anhydride	s	85-44-9	O	148.12	2.54E-07	1.90	------	6.36E-02	7.90E-06	6.20E+03	2.00E-04	2.07		
291	Polybrominated biphenyls	s	67774-32-7	O	627.59	1.62E-04	3.33	------	CE	4.63E-06	1.10E-02	5.20E-08	6.39		
292	Polychlorinated biphenyls	l	1336-36-3	O	290.00	1.75E-02	5.72	------	1.04E-01	1.00E-05	5.55E-02	7.60E-05	6.30		
293	Potassium cyanide	s	151-50-8	I	65.12	0.00E+00	--------	CE	CE	CE	7.20E+05	0.00E+00	-1.69		
294	Pronamide	s	23950-58-5	O	256.13	3.74E-04	2.30	------	8.00E-02	8.00E-06	1.50E+01	4.00E-04	3.57		
295	Propargite	l	2312-35-8	O	350.48	1.44E-06	3.75	------	3.94E-02	4.20E-06	5.00E-01	4.48E-08	3.73		
296	Propargyl alcohol	l	107-19-7	O	56.06	1.34E-05	0.73	------	1.04E-01	1.24E-05	5.57E+06	1.20E+01	-0.42		
297	Propham	s	122-42-9	O	179.22	5.30E-06	1.71	------	5.71E-02	6.28E-06	2.50E+02	1.35E-04	2.66		
298	Propylene oxide	l	75-56-9	O	58.08	3.47E-03	0.10	------	1.04E-01	1.16E-05	4.76E+05	5.32E+02	0.03		
299	Pyrene	s	129-00-0	O	202.26	4.57E-04	4.58	------	2.72E-02	7.24E-06	1.35E-01	4.25E-06	4.93		
300	Pyridine	l	110-86-1	O	79.10	2.91E-01	0.64	------	9.10E-02	7.60E-06	3.00E+02	2.00E+01	0.80		
301	Quinoline	l	91-22-5	O	129.16	1.15E-04	2.76	------	5.46E-02	8.31E-06	6.78E+03	9.60E-02	2.14		
302	Selenious acid	s	7783-00-8	I	128.97	1.27E-05	--------	CE	CE	CE	1.67E+06	3.00E+00	-3.18	1.50E-02	2.20E-02
303	Selenium	s	7782-49-2	M	78.96	0.00E+00	--------	0.34	CE	CE	0.00E+00	0.00E+00	0.24	1.50E-02	2.20E-02
304	Selenourea	CE	630-10-4	O	118.98	CE	CE	------	CE	CE	CE	CE	-2.63		
305	Silver	s	7440-22-4	M	107.87	0.00E+00	--------	-1.00	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	1.70E-01	1.00E-01
306	Sodium azide	s	26628-22-8	I	65.01	CE	--------	CE	CE	CE	4.20E+05	CE	0.86		
307	Sodium cyanide	s	143-33-9	I	49.01	0.00E+00	--------	CE	CE	CE	5.80E+05	0.00E+00	-1.69		
308	Sodium diethyldithiocarbamate	s	148-18-5	O	171.26	CE	CE	------	CE	CE	CE	CE	0.27		
309	Sodium fluoride	s	7681-49-4	I	41.99	0.00E+00	--------	CE	CE	CE	4.00E+04	0.00E+00	-0.77		
310	Strychnine	s	57-24-9	O	334.42	6.65E-12	1.90	------	8.00E-02	8.00E-06	1.43E+02	1.67E-10	1.85		

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311	Styrene	l	100-42-5	O	104.15	1.14E-01	2.88	----	7.10E-02	8.00E-06	3.10E+02	6.24E+00	2.90		
312	Tetrachlorobenzene, 1,2,4,5-	s	95-94-3	O	215.89	4.99E-02	3.20	----	2.11E-02	8.80E-06	3.00E-01	5.40E-03	4.57		
313	Tetrachloroethane, 1,1,1,2-	s	630-20-6	O	167.85	9.98E-02	2.98	----	7.10E-02	7.90E-06	1.10E+03	1.22E+01	2.93		
314	Tetrachloroethane, 1,1,2,2-	l	79-34-5	O	167.85	1.55E-02	1.89	----	7.10E-02	7.90E-06	2.97E+03	5.17E+00	2.19		
315	Tetrachloroethylene	l	127-18-4	O	165.83	7.65E-01	2.19	----	7.20E-02	8.20E-06	2.00E+02	1.84E+01	2.97		
316	Tetrachlorophenol, 2,3,4,6-	s	58-90-2	OA	231.89	2.54E-04	2.02	----	2.17E-02	7.10E-06	1.00E+02	5.02E-03	4.09		
317	Tetraethyl dithiopyrophosphate	l	3689-24-5	O	322.32	1.75E-04	2.87	----	1.50E-02	5.50E-06	2.50E+01	1.70E-04	3.98		
318	Tetraethyl lead	l	78-00-2	O	323.45	3.31E+00	3.69	----	1.32E-02	6.40E-06	8.00E-01	1.50E-01	4.88		
319	Thallium chloride	s	7791-12-0	I	239.84	0.00E+00	-------	CE	CE	CE	2.90E+03	0.00E+00	CE	1.00E-03	4.00E-04
320	Thallium nitrate	s	10102-45-1	I	266.39	7.19E-11	-------	CE	CE	CE	9.55E+04	4.71E-07	CE		
321	Thallium sulfate	s	7446-18-6	I	504.83	0.00E+00	-------	CE	CE	CE	4.87E+04	0.00E+00	CE		
322	Thiofanox	s	39196-18-4	O	218.32	3.90E-07	1.77	----	2.55E-02	6.62E-06	5.20E+03	3.10E-04	2.16		
323	Thiophanatemethyl	s	23564-05-8	O	342.40	< 3.82E-07	0.95	----	4.55E-02	4.68E-06	3.50E+00	< 7.50E-08	1.50		
324	Thiram	s	137-26-8	O	240.44	< 3.28E-06	2.83	----	2.25E-02	6.24E-06	3.00E+01	< 7.50E-06	1.70		
325	Tin	s	7440-31-5	M	118.71	0.00E+00	-------	CE	0.00E+00	0.00E+00	0.00E+00	0.00E+00	1.29	1.00E-02	6.00E-03
326	Toluene	l	108-88-3	O	92.14	2.76E-01	2.15	----	8.70E-02	8.60E-06	5.30E+02	2.82E+01	2.54		
327	Toluenediamine, 2,4-	s	95-80-7	O	122.17	7.48E-08	3.11	----	8.00E-02	8.00E-06	7.47E+03	8.36E-05	0.16		
328	Toluenediamine, 2,6-	s	823-40-5	O	122.17	5.15E-10	CE	----	6.87E-02	7.97E-06	4.80E+04	1.98E-05	0.16		
329	Toluene diisocyanate, 2,4/2,6-	l	26471-62-5	O	174.16	6.86E-06	3.35	----	6.09E-02	6.80E-06	1.11E+05	8.00E-02	3.74		
330	Toluidine, p-	s	106-49-0	O	107.16	3.82E-04	1.40	----	8.00E-02	8.00E-06	7.20E+03	3.30E-01	1.62		
331	Toxaphene	s	8001-35-2	O	413.81	1.40E-04	4.98	----	1.16E-02	4.34E-06	7.40E-01	4.19E-06	6.79		
332	TP Silvex, 2,4,5-	s	93-72-1	O	269.51	5.45E-07	3.41	----	1.94E-02	5.80E-06	1.40E+02	5.20E-06	3.68		
333	Triallate	s	2303-17-5	O	304.67	4.53E-04	3.16	----	4.58E-02	4.84E-06	4.00E+00	1.20E-04	4.57		
334	Trichloro-1,2,2-trifluoroethane, 1,1,2	l	76-13-1	O	187.38	2.20E+01	3.11	----	7.80E-02	8.20E-06	2.00E+02	3.60E+02	3.09		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H' (cm^3-H_2O/cm^3-air)	$LogK_{oc}$	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abg} (g soil/g D.W.)	Br_{Bg} (g soil/g D.W.)
335	Trichlorobenzene, 1,2,4-	l	120-82-1	O	181.45	5.90E-02	3.22	------	3.00E-02	8.23E-06	4.88E+01	3.36E-01	3.93		
336	Trichloroethane, 1,1,1-	l	71-55-6	O	133.40	7.15E-01	2.04	------	7.80E-02	8.80E-06	1.33E+03	1.24E+02	2.68		
337	Trichloroethane, 1,1,2-	l	79-00-5	O	133.40	3.80E-02	1.70	------	7.92E-02	8.80E-06	4.42E+03	2.52E+01	2.01		
338	Trichloroethylene	l	79-01-6	O	131.39	4.28E-01	1.97	------	7.90E-02	9.10E-06	1.10E+03	7.20E+01	2.47		
339	Trichlorofluoromethane	l	75-69-4	O	137.37	4.03E+00	2.13	------	8.70E-02	9.70E-06	1.10E+03	6.87E+02	2.13		
340	Trichlorophenol, 2,4,5-	s	95-95-4	OA	197.45	1.78E-04	2.47	------	2.91E-02	7.03E-06	1.20E+03	1.63E-02	3.45		
341	Trichlorophenol, 2,4,6-	s	88-06-2	OA	197.45	3.19E-04	2.12	------	3.18E-02	6.25E-06	9.82E+02	1.18E-02	3.45		
342	Trichlorophenoxyacetic acid, 2,4,5-	s	93-76-5	O	255.48	3.62E-07	1.72	------	8.00E-02	8.00E-06	2.78E+02	3.61E-06	3.26		
343	Trichloropropane, 1,1,2-	l	598-77-6	O	147.43	1.21E+00	2.24	------	3.96E-02	9.30E-06	4.44E+01	6.64E+00	2.43		
344	Trichloropropane, 1,2,3-	l	96-18-4	O	147.43	1.58E-02	2.59	------	7.10E-02	7.90E-06	1.90E+03	3.70E+00	2.50		
345	Triethylamine	l	121-44-8	O	101.19	1.99E-02	1.12	------	7.54E-02	7.51E-06	1.50E+04	5.00E+01	1.51		
346	Trifluralin	s	1582-09-8	O	335.28	2.01E-03	4.14	------	1.49E-02	4.70E-06	6.00E-01	1.10E-04	5.31		
347	Trimethylbenzene, 1,2,3-	l	526-73-8	O	120.19	1.33E-01	2.77	------	6.77E-02	7.41E-06	7.52E+01	1.49E+00	3.55		
348	Trinitrobenzene, 1,3,5-	s	99-35-4	O	213.11	2.87E-06	1.15	------	8.00E-02	8.00E-06	3.53E+02	9.90E-05	1.45		
349	Trinitrophenylmethylnitramine, 2,4,6-	s	479-45-8	O	287.15	8.31E-11	2.37	------	5.69E-02	6.40E-06	7.50E+01	4.00E-10	2.04		
350	Trinitrotoluene, 2,4,6-	s	118-96-7	O	227.13	1.90E-05	2.48	------	5.41E-02	6.57E-06	1.30E+02	1.24E-04	1.99		
351	Uranium	s	7440-61-1	M	238.03	0.00E+00	--------	3.47	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	5.00E-03	4.00E-03
352	Vanadium	s	7440-62-2	M	50.94	0.00E+00	--------	3.00	0.00E+00	0.00E+00	0.00E+00	0.00E+00	0.00	3.60E-03	3.00E-03
353	Vanadium pentoxide	s	1314-62-1	I	181.88	0.00E+00	--------	CE	CE	CE	8.00E+03	0.00E+00	CE	3.60E-03	3.00E-03
354	Vernam	l	1929-77-7	O	203.35	7.36E-04	3.44	------	5.10E-02	5.39E-06	9.85E+01	1.04E-02	3.51		
355	Vinyl acetate	l	108-05-4	O	86.09	2.29E-02	0.72	------	8.50E-02	9.20E-06	2.00E+04	1.09E+02	0.73		
356	Vinyl chloride	g	75-01-4	O	62.50	3.49E+00	1.04	------	1.06E-01	1.23E-05	2.76E+03	2.80E+03	1.62		
357	Warfarin	s	81-81-2	O	308.33	1.15E-07	2.96	------	1.63E-02	4.40E-06	1.70E+01	1.16E-07	3.20		
358	Xylenes	l	1330-20-7	O	106.17	2.93E-01	2.38	------	7.40E-02	8.50E-06	1.98E+02	8.06E+00	3.09		

No	COMPOUND	Physical State	CAS number	Type	M.W. (g/mole)	H ' (cm^3-H_2O/cm^3-air)	LogK_{oc}	Log K_d	D_{air} (cm^2/s)	D_{wat} (cm^2/s)	Solubility (mg/l)	Vapor Pressure (mm Hg)	Log K_{ow}	Br_{Abs} (g soil/g D.W.)	Br_{Bio} (g soil/g D.W.)
359	Xylene, m-	l	108-38-3	O	106.17	3.05E-01	2.29	------	7.00E-02	7.80E-06	1.60E+02	8.00E+00	3.20		
360	Xylene, o-	l	95-47-6	O	106.17	7.36E-04	2.11	------	8.70E-02	1.00E-05	1.78E+02	6.75E+00	3.13		
361	Xylene, p-	l	106-42-3	O	106.17	3.18E-01	2.49	------	7.69E-02	8.44E-06	1.85E+02	8.76E+00	3.17		
362	Zinc	s	7440-66-6	M	65.39	0.00E+00	--------	1.20	0.00E+00	0.00E+00	0.00E+00	0.00E+00	-0.47	9.00E-02	4.40E-02
363	Zinc cyanide	s	557-21-1	I	117.43	CE	--------	1.60	CE	CE	0.00E+00	CE	-2.31		
364	Zinc phosphide	s	1314-84-7	I	258.12	0.00E+00	--------	1.60	CE	CE	0.00E+00	0.00E+00	CE		
365	6 C aliphatics (TPH)	l	---	O	81	3.3E+01	2.9	------	1.0E-01	1.0E-05	3.6E+01	2.7E+02	---		
366	>6-8 C aliphatics (TPH)	l	---	O	100	5.0E+01	3.6	------	1.0E-01	1.0E-05	5.4E+00	4.8E+01	---		
367	>8-10 C aliphatics (TPH)	l	---	O	130	8.0E+01	4.5	------	1.0E-01	1.0E-05	4.3E-01	4.8E+00	---		
368	>10-12 C aliphatics (TPH)	l	---	O	160	1.2E+02	5.4	------	1.0E-01	1.0E-05	3.4E-02	4.8E-01	---		
369	>12-16 C aliphatics (TPH)	l	---	O	200	5.2E+02	6.7	------	1.0E-01	1.0E-05	7.6E-04	3.6E-02	---		
370	>16-35 C aliphatics (TPH)	l	---	O	270	4.9E+03	8.8	------	1.0E-01	1.0E-05	2.5E-06	8.4E-04	---		
371	5-7 C aromatics (TPH) - Benzene	l		O	78	2.27E-01	1.82	------	8.8E-02	9.8E-06	1.77E+03	9.50E+01	---		
372	>7-8 C aromatics (TPH) - Toluene	l	---	O	92	2.76E-01	2.15	------	8.7E-02	8.6E-06	5.30E+02	2.82E+01	---		
370	>8-10 C aromatics (TPH)	l	---	O	120	4.8E-01	3.2	------	1.0E-01	1.0E-05	6.5E+01	4.8E+00	---		
371	>10-12 C aromatics (TPH)	l	---	O	130	1.4E-01	3.4	------	1.0E-01	1.0E-05	2.5E+01	4.8E-01	---		
375	>12-16 C aromatics (TPH)	l	---	O	150	5.3E-02	3.7	------	1.0E-01	1.0E-05	5.8E+00	3.6E-02	---		
376	>16-21 C aromatics (TPH)	l	---	O	190	1.3E-02	4.2	------	1.0E-01	1.0E-05	6.5E-01	8.4E-04	---		
377	>21-35 C aromatics (TPH)	s	---	O	240	6.7E-04	5.1	------	1.0E-01	1.0E-05	6.6E-03	3.3E-07	---		

Legend

s	*compound solid at @ 20 °C*	D_{air}	*Diffusion coefficient in air (cm^2/s)*
l	*compound liquid at @ 20 °C*	D_{wat}	*Diffusion coefficient in water (cm^2/s)*
g	*compound gaseous at @ 20 °C*	K_{ow}	*Octanol-water partition coefficient (cm^3-H_2O/cm^3-Octanol)*
H'	*Dimensionless Henry's Law Constant H' = H x 41.57 @ 20 °C (cm^3-H_2O/cm^3-air)*	Br_{Abg}	*Soil-to-above ground plant biotransfer factor (g soil/g plant tissue dry weight)*
H	*Henry's Law Constant (atm-m^3/mole)*	Br_{Bg}	*Soil-to-below ground plant biotransfer factor (g soil/g plant tissue dry weight)*
MW	*Molecular Weight (g/mole)*	*Type*	*O: Organic, I: Inorganic, M: Metal, OA: Organic Acids*
K_{oc}	*Soil organic carbon-water partition coefficient (cm^3-H_2O/g-Carbon)*	*CE*	*Not found, Can not estimate*
K_d	*Soil-water partition coefficient (cm^3-H_2O/g-Soil)*	*NA/reacts*	*Not applicable because reacts with water*
		Values in italic	*Estimated by TCEQ*

Figure: 30 TAC §350.73(e)(1)(C)

K_d Values (L/kg) for Inorganic COCs as a Function of pH[a]													
pH	Sb	As	Ba	Be	Cd	Cr (3)	Cr(6)	Hg	Ni	Ag	Se	Tl	Zn
4.9	9.6E+01	2.5E+01	1.1E+01	2.3E+01	1.5E+01	1.2E+03	3.1E+01	4.0E-02	1.6E+01	1.0E-01	1.8E+01	4.4E+01	1.6E+01
5.0	9.1E+01	2.5E+01	1.2E+01	2.6E+01	1.7E+01	1.9E+03	3.1E+01	6.0E-02	1.8E+01	1.3E-01	1.7E+01	4.5E+01	1.8E+01
5.1	8.7E+01	2.5E+01	1.4E+01	2.8E+01	1.9E+01	3.0E+03	3.0E+01	9.0E-02	2.0E+01	1.6E-01	1.6E+01	4.6E+01	1.9E+01
5.2	8.3E+01	2.6E+01	1.5E+01	3.1E+01	2.1E+01	4.9E+03	2.9E+01	1.4E-01	2.2E+01	2.1E-01	1.5E+01	4.7E+01	2.1E+01
5.3	7.9E+01	2.6E+01	1.7E+01	3.5E+01	2.3E+01	8.1E+03	2.8E+01	2.0E-01	2.4E+01	2.6E-01	1.4E+01	4.8E+01	2.3E+01
5.4	7.6E+01	2.6E+01	1.9E+01	3.8E+01	2.5E+01	1.3E+04	2.7E+01	3.0E-01	2.6E+01	3.3E-01	1.3E+01	5.0E+01	2.5E+01
5.5	7.2E+01	2.6E+01	2.1E+01	4.2E+01	2.7E+01	2.1E+04	2.7E+01	4.6E-01	2.8E+01	4.2E-01	1.2E+01	5.1E+01	2.6E+01
5.6	6.9E+01	2.6E+01	2.2E+01	4.7E+01	2.9E+01	3.5E+04	2.6E+01	6.9E-01	3.0E+01	5.3E-01	1.1E+01	5.2E+01	2.8E+01
5.7	6.5E+01	2.7E+01	2.4E+01	5.3E+01	3.1E+01	5.5E+04	2.5E+01	1.0E+00	3.2E+01	6.7E-01	1.1E+01	5.4E+01	3.0E+01
5.8	6.2E+01	2.7E+01	2.6E+01	6.0E+01	3.3E+01	8.7E+04	2.5E+01	1.6E+00	3.4E+01	8.4E-01	9.8E+00	5.5E+01	3.2E+01
5.9	6.0E+01	2.7E+01	2.8E+01	6.9E+01	3.5E+01	1.3E+05	2.4E+01	2.3E+00	3.6E+01	1.1E+00	9.2E+00	5.6E+01	3.4E+01
6.0	5.7E+01	2.7E+01	3.0E+01	8.2E+01	3.7E+01	2.0E+05	2.3E+01	3.5E+00	3.8E+01	1.3E+00	8.6E+00	5.8E+01	3.6E+01
6.1	5.4E+-01	2.7E+01	3.1E+01	9.9E+01	4.0E+01	3.0E+05	2.3E+01	5.1E+00	4.0E+01	1.7E+00	8.0E+00	5.9E+01	3.9E+01
6.2	5.2E+01	2.8E+01	3.3E+01	1.2E+02	4.2E+01	4.2E+05	2.2E+01	7.5E+00	4.2E+01	2.1E+00	7.5E+00	6.1E+01	4.2E+01
6.3	4.9E+01	2.8E+01	3.5E+01	1.6E+02	4.4E+01	5.8E+05	2.2E+01	1.1E+01	4.5E+01	2.7E+00	7.0E+00	6.2E+01	4.4E+01
6.4	4.7E+01	2.8E+01	3.6E+01	2.1E+02	4.8E+01	7.7E+05	2.1E+01	1.6E+01	4.7E+01	3.4E+00	6.5E+00	6.4E+01	4.7E+01
6.5	4.5E+01	2.8E+01	3.7E+01	2.8E+02	5.2E+01	9.9E+05	2.0E+01	2.2E+01	5.0E+01	4.2E+00	6.1E+00	6.6E+01	5.1E+01
6.6	4.3E+01	2.8E+01	3.9E+01	3.9E+02	5.7E+01	1.2E+06	2.0E+01	3.0E+01	5.4E+01	5.3E+00	5.7E+00	6.7E+01	5.4E+01
6.7	4.1E+01	2.9E+01	4.0E+01	5.5E+02	6.4E+01	1.5E+06	1.9E+01	4.0E+01	5.8E+01	6.6E+00	5.3E+00	6.9E+01	5.8E+01
6.8	3.9E+01	2.9E+01	4.1E+01	7.9E+02	7.5E+01	1.8E+06	1.9E+01	5.2E+01	6.5E+01	8.3E+00	5.0E+00	7.1E+01	6.2E+01
6.9	3.7E+01	2.9E+01	4.2E+01	1.1E+03	9.1E+01	2.1E+06	1.8E+01	6.6E+01	7.4E+01	1.0E+01	4.7E+00	7.3E+01	6.8E+01
7.0	3.5E+01	2.9E+01	4.2E+01	1.7E+03	1.1E+02	2.5E+06	1.8E+01	8.2E+01	8.8E+01	1.3E+01	4.3E+00	7.4E+01	7.5E+01
7.1	3.4E+01	2.9E+01	4.3E+01	2.5E+03	1.5E+02	2.8E+06	1.7E+01	9.9E+01	1.1E+02	1.6E+01	4.1E+00	7.6E+01	8.3E+01
7.2	3.2E+01	3.0E+01	4.4E+01	3.8E+03	2.0E+02	3.1E+06	1.7E+01	1.2E+02	1.4E+02	2.0E+01	3.8E+00	7.8E+01	9.5E+01
7.3	3.1E+01	3.0E+01	4.4E+01	5.7E+03	2.8E+02	3.4E+06	1.6E+01	1.3E+02	1.8E+02	2.5E+01	3.5E+00	8.0E+01	1.1E+02
7.4	2.9E+01	3.0E+01	4.5E+01	8.6E+03	4.0E+02	3.7E+06	1.6E+01	1.5E+02	2.5E+02	3.1E+01	3.3E+00	8.2E+01	1.3E+02
7.5	2.8E+01	3.0E+01	4.6E+01	1.3E+04	5.9E+02	3.9E+06	1.6E+01	1.6E+02	3.5E+02	3.9E+01	3.1E+00	8.5E+01	1.6E+02
7.6	2.6E+01	3.1E+01	4.6E+01	2.0E+04	8.7E+02	4.1E+06	1.5E+01	1.7E+02	4.9E+02	4.8E+01	2.9E+00	8.7E+01	1.9E+02
7.7	2.5E+01	3.1E+01	4.7E+01	3.0E+04	1.3E+03	4.2E+06	1.5E+01	1.8E+02	7.0E+02	5.9E+01	2.7E+00	8.9E+01	2.4E+02
7.8	2.4E+01	3.1E+01	4.9E+01	4.6E+04	1.9E+03	4.3E+06	1.4E+01	1.9E+02	9.9E+02	7.3E+01	2.5E+00	9.1E+01	3.1E+02
7.9	2.3E+01	3.1E+01	5.0E+01	6.9E+04	2.9E+03	4.3E+06	1.4E+01	1.9E+02	1.4E+03	8.9E+01	2.4E+00	9.4E+01	4.0E+02
8.0	2.2E+01	3.1E+01	5.2E+01	1.0E+05	4.3E+03	4.3E+06	1.4E+01	2.0E+02	1.9E+03	1.1E+02	2.2E+00	9.6E+01	5.3E+02

[a] non pH-dependent inorganic K_d values for cyanide, and vanadium are 9.9, and 50 respectively.

Figure: 30 TAC §350.74(a)

Risk-Based Exposure Limit Equations and Default Exposure Factors

RBEL-1:

Inhalation of carcinogenic COCs - RBEL (mg/m^3)

$$^{Air}RBEL_{Inh\text{-}c} = \frac{RL \times ATc \times 365\ days/yr}{URF \times 1000\ \mu g/mg \times EF.res \times ED.A.res}$$

Inhalation of noncarcinogenic COCs - RBEL (mg/m^3)

$$^{Air}RBEL_{Inh\text{-}nc} = \frac{RfC \times HQ \times AT.A.res \times 365\ days/yr}{EF.res \times ED.A.res}$$

RBEL-2:

Dermal contact with carcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Derm\text{-}c} = \frac{RL \times ATc \times 365\ days/yr}{SF_d \times MF \times 10^{-6}\ kg/mg \times EF.res \times DF.adj \times ABS.d}$$

where: $SF_d = \frac{SF_o}{ABS_{GI}}$ when ABS_{GI} <50%, otherwise $SF_d = SF_o$; and

$$DF.adj = \frac{(SA_{0<6})(AF_{0<6})(ED_{0<6})}{(BW_{0<6})} + \frac{(SA_{6<18})(AF_{6<18})(ED_{6<18})}{(BW_{6<18})} + \frac{(SA_{18<30})(AF_{18<30})(ED_{18<30})}{(BW_{18<30})}$$

Dermal contact with noncarcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Derm\text{-}nc} = \frac{HQ \times RfD_d \times BW.C \times AT.C.res \times 365\ days/yr}{10^{-6}\ kg/mg \times ED.C.res \times EF.res \times SA.C.res \times AF.C.res \times ABS.d}$$

where $RfD_d = (RfD_o)\ (ABS_{GI})$ when ABS_{GI} <50%, otherwise $RfD_d = RfD_o$

RBEL-3:

Ingestion of carcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Ing\text{-}c} = \frac{RL \times ATc \times 365\ days/yr}{SF_o \times MF \times 10^{-6}\ kg/mg \times EF.res \times IRsoil.AgeAdj.res \times RBAF}$$

Ingestion of noncarcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Ing\text{-}nc} = \frac{HQ \times BW.C \times RfD_o \times AT.C.res \times 365\ days/yr}{10^{-6}\ kg/mg \times EF.res \times ED.C.res \times IRsoil.C.res \times RBAF}$$

RBEL-5:

Class 3 Groundwater RBEL

$$^{GW}RBEL_{Class\ 3} = 100 \times RBEL\text{-}4$$

RBEL-7:

Ingestion of carcinogenic COCs in above-ground vegetables - RBEL (mg/kg)

$$^{AbgVeg}RBEL_{Ing\text{-}c} = \frac{RL \times ATc \times 365\ day/yr}{EF.res \times SF_o \times MF \times IRabg.AgeAdj.res}$$

Ingestion of noncarcinogenic COCs in above-ground vegetables - RBEL (mg/kg)

$$^{AbgVeg}RBEL_{Ing\text{-}nc} = \frac{HQ \times RfD_o \times BW.C \times AT.C.res \times 365\ day/yr}{EF.res \times ED.C.res \times IRabg.C.res}$$

Ingestion of carcinogenic COCs in below-ground vegetables - RBEL (mg/kg)

$$^{BgVeg}RBEL_{Ing\text{-}c} = \frac{RL \times ATc \times 365\ day/yr}{EF.res \times SF_o \times MF \times IRbg.AgeAdj.res}$$

Ingestion of noncarcinogenic COCs in below-ground vegetables - RBEL (mg/kg)

$$^{BgVeg}RBEL_{Ing\text{-}nc} = \frac{HQ \times RfD_o \times BW.C \times AT.C.res \times 365\ day/yr}{EF.res \times ED.C.res \times IRbg.C.res}$$

Risk-Based Exposure Limit Equations [illegible] Factors for Residents	
RBEL-4: Ingestion of carcinogenic COCs in water - RBEL (mg/L) $^{GW}RBEL_{Ing\text{-}c}$ = primary MCL when available, or a secondary MCL under the conditions described in §350.74(f)(3), otherwise $\frac{RL \times AT_c \times 365\ days/yr}{SF_o \times MF \times IRw.AgeAdj.res \times EF.res}$ Ingestion of noncarcinogenic COCs in water - RBEL (mg/L) $^{GW}RBEL_{Ing\text{-}nc}$ = primary MCL when available, or a secondary MCL under the conditions described in §350.74(f)(3), otherwise $\frac{RfD_o \times HQ \times BW.C \times AT.C.res \times 365\ days/yr}{IRw.C.res \times EF.res \times ED.C.res}$	RBEL-6: Surface Water RBEL $^{SW}RBEL$ =the lowest value of each COC established under §350.74(h)(1) - (4), unless the person has sufficient property-specific surface water quality information specific to the particular surface water body at the affected property to support an adjustment to the RBEL in accordance with §350.74(h)(5). $^{SW}RBEL$ determined pursuant to §350.74(h)(1) - (5) may require modification in response to §350.74(h)(6) - (7).

Risk-Based Exposure Limit Equations and Default Exposure Factors for Residents

Term	Exposure Factor	Default Exposure Factor	Change to Default Exposure Factor Allowed?	Citation for Change
ABS.d**	Dermal Absorption Fraction (unitless)	(Figure: 30 TAC §350.74(c))	Tier 2/3	§350.74(j)(1)(B)
ABS_{GI}	Gastrointestinal Absorption Fraction (unitless)	(Figure: 30 TAC §350.74(c))	Tier 2/3	§350.74(j)(1)(A)
AF.C.res	Soil-to-Skin Adherence Factor (mg/cm^2-event) - Child	0.2	No	NA
$AF_{(0<6)}$	Age-Specific Adherence Factor (mg/cm^2-event)	0.2	No	NA
$AF_{(6<18)}$	Age-Specific Adherence Factor (mg/cm^2-event)	0.1	No	NA
$AF_{(18<30)}$	Age-Specific Adherence Factor (mg/cm^2-event)	0.1	No	NA
AT.A.res	Averaging Time - noncarcinogens (yr)-Adult	30	No	NA
ATc	Averaging Time - carcinogens (yr)	70	No	NA
AT.C.res	Averaging Time - noncarcinogens (yr) -Child	6	No	NA
BW.C	Body Weight (kg) - Child	15	No	NA
$BW_{(0<6)}$	Age-Specific Body Weight (kg)	15	No	NA
$BW_{(6<18)}$	Age-Specific Body Weight (kg)	45	No	NA
$BW_{(18<30)}$	Age-Specific Body Weight (kg)	70	No	NA
DF.adj	Dermal Adjustment Factor (mg-yr/kg-event)	352	No	NA
ED.A.res	Exposure Duration (yr) - Adult	30	No	NA
ED.C.res	Exposure Duration (yr) - Child	6	No	NA
$ED_{(0<6)}$	Age-Specific Exposure Duration (yr)	6	No	NA
$ED_{(6<18)}$	Age-Specific Exposure Duration (yr)	12	No	NA
$ED_{(18<30)}$	Age-Specific Exposure Duration (yr)	12	No	NA
EF.res	Exposure Frequency (days/yr) (event/yr for dermal soil)	350	No	NA
HQ	Hazard Quotient (unitless)	1	No	NA
IRsoil.AgeAdj.res	Age-Adjusted Soil Ingestion Rate (mg-yr/kg-day)	120	No	NA
IRsoil.C.res	Soil Ingestion Rate (mg/day) - Child	191	No	NA
IRw.AgeAdj.res	Age-Adjusted Water Ingestion Rate (L-yr/kg-day)	0.80	No	NA
IRw.C.res	Water Ingestion Rate (L/Day) - Child	0.64	No	NA
MF	Modifying Factor for SFo (unitless)	1	No	NA
	for Arsenic	0.1	No	
RBAF	Relative Bioavailability Factor (unitless)	1	Tier 2/3	§350.74(j)(1)(C)
	for Arsenic	0.78	Tier 2/3	§350.74(j)(1)(C)

Risk-Based Exposure Limit Equations and Default Exposure Factors for Residents				
Term	**Exposure Factor**	**Default Exposure Factor**	**Change to Default Exposure Factor Allowed?**	**Citation for Change**
RL	Risk Level (unitless)	10^{-5}	No	NA
SA.C.res	Skin Surface Area (cm^2)- Child	2200	No	NA
$SA_{(0<6)}$	Age-specific Skin Surface Area (cm^2)	2200	No	NA
$SA_{(6<18)}$	Age-specific Skin Surface Area (cm^2)	3500	No	NA
$SA_{(18<30)}$	Age-specific Skin Surface Area (cm^2)	4800	No	NA
SF_d	Dermal Slope Factor $(mg/kg\text{-}day)^{-1}$	Chemical Specific	NA	§350.73(a)
SF_o	Oral Slope Factor $(mg/kg\text{-}day)^{-1}$	Chemical Specific	NA	§350.73(a)
URF	Inhalation Unit Risk Factor $(\mu g/m^3)^{-1}$	Chemical Specific	NA	§350.53(a) - (b)
Vegetable Ingestion Rate - Age-Adjusted (kg-yr/kg-day)				
	IRabg.AgeAdj.res Aboveground Vegetables	0.0028	No	NA
	IRbg.AgeAdj.res Below-Ground Vegetables	0.0012	No	NA
Vegetable Ingestion Rate - Child (kg/day)				
	IRabg.C.res Aboveground Vegetables	0.0024	No	NA
	IRbg.C.res Below-Ground Vegetables	0.0010	No	NA

Footnote:
** It is not necessary to calculate a soil dermal contact RBEL for COCs with a vapor pressure in mm HG ≥ 1.
NA means not applicable.

Risk Based Exposure Limit Equations and Default Exposure Factors for Commercial/Industrial Worker

RBEL-1:

Inhalation of carcinogenic COCs - RBEL (mg/m^3)

$$^{Air}RBEL_{Inh\text{-}c} = \frac{RL \times ATc \times 365\ days/yr}{URF \times 1000\ \mu g/mg \times EF.w \times ED.w}$$

Inhalation of noncarcinogenic COCs - RBEL (mg/m^3)

$$^{Air}RBEL_{Inh\text{-}nc} = \frac{RfC \times HQ \times AT.w \times 365\ days/yr}{EF.w \times ED.w}$$

RBEL-2:

Dermal contact with carcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Derm\text{-}c} = \frac{RL \times BW.A \times ATc \times 365\ days/yr}{SF_d \times MF \times 10^{-6}\ kg/mg \times ED.w \times EF.w \times SA.w \times AF.w \times ABS.d}$$

where: $SF_d = \frac{SF_o}{ABS_{GI}}$ when ABS_{GI} <50%, otherwise $SF_d = SF_o$

Dermal contact with noncarcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Derm\text{-}nc} = \frac{HQ \times RfD_d \times BW.A \times AT.w \times 365\ days/yr}{10^{-6}\ kg/mg \times ED.w \times EF.w \times SA.w \times AF.w \times ABS.d}$$

where $RfD_d = (RfD_o)\ (ABS_{GI})$ when ABS_{GI} <50%, otherwise $RfD_d = RfD_o$

RBEL-4:

Ingestion of carcinogenic COCs in water - RBEL (mg/L)

$^{GW}RBEL_{Ing\text{-}c}$ = primary MCL when available, or a secondary MCL under the conditions described in §350.74(f)(3), otherwise

$$\frac{RL \times BW.A \times ATc \times 365\ days/yr}{SF_o \times MF \times IRw.w \times EF.w \times ED.w}$$

Ingestion of noncarcinogenic COCs in water - RBEL (mg/L)

$^{GW}RBEL_{Ing\text{-}nc}$ = primary MCL when available, or a secondary MCL under the conditions described in §350.74(f)(3), otherwise

$$\frac{RfD_o \times HQ \times BW.A \times AT.w \times 365\ days/yr}{IRw.w \times EF.w \times ED.w}$$

RBEL-5:

Class 3 groundwater RBEL

$$^{GW}RBEL_{Class3} = 100 \times RBEL\text{-}4$$

Risk-Based Exposure Limit Equations and Default Exposure Factors for Commercial/Industrial Worker

RBEL-3:

Ingestion of carcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Ing\text{-}c} = \frac{RL \times BW.A \times AT_c \times 365\ days/yr}{SF_o \times MF \times 10^{-6}\ kg/mg \times EF.w \times ED.w \times IRsoil.w \times RBAF}$$

Ingestion of noncarcinogenic COCs in soil - RBEL (mg/kg)

$$^{Soil}RBEL_{Ing\text{-}nc} = \frac{HQ \times BW.A \times RfD_o \times AT.w \times 365\ days/yr}{10^{-6}\ kg/mg \times EF.w \times ED.w \times IRsoil.w \times RBAF}$$

RBEL-6: Surface Water RBEL

$^{SW}RBEL$ =the lowest value of each COC established under §350.74(h)(1) - (4), unless the person has sufficient property-specific surface water quality information specific to the particular surface water body at the affected property to support an adjustment to the RBEL in accordance with §350.74(h)(5). $^{SW}RBEL$ determined pursuant to §350.74(h)(1) - (5) may require modification in response to §350.74(h)(6) - (7).

Term	Exposure Factor	Default Exposure Factor	Change to Default Exposure Factor Allowed?	Citation for Change
ABS.d**	Dermal Absorption Fraction (unitless)	(Figure: 30 TAC §350.74(c))	Tier 2/3	§350.74(j)(1)(B)
ABS_{GI}	Gastrointestinal Absorption Fraction (unitless)	(Figure: 30 TAC §350.74(c))	Tier 2/3	§350.74(j)(1)(A)
AF.w	Soil-to-Skin Adherence Factor (mg/cm^2-event)	0.2	No	NA
ATc	Averaging Time - carcinogens (yr)	70	No	NA
AT.w	Averaging Time - noncarcinogens (yr)	25	Tier 2/3	§350.74(j)(2)
BW.A	Body Weight, adult (kg)	70	No	NA
ED.w	Exposure Duration (yr)	25	Tier 2/3	§350.74(j)(2)
EF.w	Exposure Frequency (days/yr) (event/yr for dermal soil)	250	Tier 2/3	§350.74(j)(2)
HQ	Hazard Quotient (unitless)	1	No	NA
IRsoil.w	Soil Ingestion Rate (mg/day)	100	No	NA
IRw.w	Water Ingestion Rate (L/day)	1.4	No	NA
MF	Modifying Factor for SF_o (unitless)	1	No	NA
	for Arsenic	0.1	No	NA
RBAF	Relative Bioavailability Factor (unitless)	1	Tier 2/3	§350.74(j)(1)(D)
	for Arsenic	0.78	Tier 2/3	§350.74(j)(1)(D)
RfC*	Reference Concentration (mg/m^3)	Chemical-Specific	NA	§350.73(a) - (b)
RfD_o	Oral Reference Dose (mg/kg-day)	Chemical-Specific	NA	§350.73(a)
RfD_d	Dermal Reference Dose (mg/kg-day)	Chemical-Specific	NA	§350.73(a)
RL	Risk Level (unitless)	10^{-5}	No	NA
SA.w	Skin Surface Area (cm^2)	2500	No	NA
SF_d	Dermal Slope Factor $(mg/kg\text{-}day)^{-1}$	Chemical-Specific	NA	§350.73(a)
SF_o	Oral Slope Factor $(mg/kg\text{-}day)^{-1}$	Chemical-Specific	NA	§350.73(a)
URF	Inhalation Unit Risk Factor $(\mu g/m^3)^{-1}$	Chemical-Specific	NA	§350.73(a) - (b)

Footnote:

** It is not necessary to calculate a soil dermal contact RBEL for COCs with a vapor pressure in mm HG $\geq$ 1.

NA means not applicable.

Figure: 30 TAC §350.75(b)(1)

Tier 1 PCL Equations

Groundwater Ingestion PCL Equation: $^{GW}GW_{Ing}$

Exposure Pathway Description: Ingestion of groundwater
Source Medium: Groundwater
Exposure Medium: Groundwater

$^{GW}GW_{Ing} = {}^{GW}RBEL_{Ing}$ *(See Eq. RBEL-4, Figure: 30 TAC §350.74(a))*

Class 3 Groundwater PCL Equation: $^{GW}GW_{Class\ 3}$

Exposure Pathway Description: Class 3 groundwater
Source Medium: Class 3 groundwater
Exposure Medium: Class 3 groundwater

$^{GW}GW_{Class\ 3} = {}^{GW}RBEL_{Class\ 3}$ *(See Eq.RBEL-5, Figure: 30 TAC §350.74(a))*

Groundwater Volatilization PCL Equation: $^{Air}GW_{Inh\text{-}V}$

Exposure Pathway Description: Inhalation of volatiles from class 1, 2, or 3 groundwater
Source Medium: Class 1, 2, or 3 groundwater
Exposure Medium: Outdoor air

$$^{Air}GW_{Inh\text{-}V} = \frac{^{Air}RBEL_{Inh\_}}{VF_{Wamb}}$$ *(See Eq. RBEL-1, Figure: 30 TAC §350.74(a))*

$$VF_{wamb}\left[\frac{mg/m^3 - air}{mg/L - H_2O}\right] = \frac{H'}{1+\left[\frac{U_{air}\delta_{air}L_{gw}}{W_g D_{ws}^{eff}}\right]} \bullet \left[10^3 \frac{L}{m^3}\right]$$

$$D_{ws}^{eff}\left[\frac{cm^2}{s}\right] = (h_{cap} + h_v)\left[\frac{h_{cap}}{D_{cap}^{eff}} + \frac{h_v}{D_s^{eff}}\right]^{-1}$$

$$D_{cap}^{eff}\left[\frac{cm^2}{s}\right] = D^{air}\frac{\theta_{acap}^{3.33}}{\theta_T^2} + \left[\frac{D^{wat}}{H'}\right]\left[\frac{\theta_{wcap}^{3.33}}{\theta_T^2}\right]$$

$$D_s^{eff}\left[\frac{cm^2}{s}\right] = D^{air}\frac{\theta_{as}^{3.33}}{\theta_T^2} + \left[\frac{D^{wat}}{H'}\right]\left[\frac{\theta_{ws}^{3.33}}{\theta_T^2}\right]$$

Groundwater-to-Surface Water PCL Equation: ^{SW}GW				
Exposure Pathway Description: Discharge of class 1, 2, or 3 groundwater to surface water Source Medium: Class 1, 2, or 3 groundwater Exposure Medium: Surface water $$^{SW}GW = \frac{^{SW}SW}{DF}$$ *(See Eq. RBEL-6, Figures: 30 TAC §350.74(a); and 30 TAC §350.75(i)(4))*				
Term	***COC Chemical/Physical and Affected Property Parameters Definition***	***Tier 1 Defaults***	***Change to Tier 1 Default Allowed?***	***Rule Citation Regarding Change***
ρ_b	Soil bulk density (g/cm^3)	1.67	Tier 2, 3	§350.75(c) and (d)
θ_{ws}	Volumetric water content of vadose zone soils (cm^3-water/cm^3-soil)	0.16	Tier 2, 3	§350.75(c) and (d)
θ_{as}	Volumetric air content of vadose zone soils (cm^3-air/cm^3-soil) = θ_T-θ_{ws}	0.21	Tier 2, 3	§350.75(c) and (d)
θ_T	Total soil porosity = 1 - (ρ_b/ρ_s) (cm^3-pore space/cm^3-soil)	0.37	Tier 2, 3	§350.75(c) and (d)
ρ_s	Particle density (g/cm^3)	2.65	Tier 2, 3	§350.75(c) and (d)
H′	Dimensionless Henry's Law Constant	(Figure: 30 TAC §350.73(e))	No	NA
H	Henry's Law Constant (atm-m^3/mole) (H=H′RT)	(Figure: 30 TAC §350.73(e))	No	NA
R	Universal Gas Constant (atm m^3 mol^{-1} $°K^{-1}$)	8.206×10^{-5}	No	NA
T	Temperature (°K) = 273 + °C	293	No	NA
U_{air}	Windspeed above ground surface in ambient mixing zone (cm/s)	240	Tier 2, 3	§350.75(c) and (d)

Term	COC Chemical/Physical and Affected Property Parameters Definition	Tier 1 Defaults	Change to Tier 1 Default Allowed?	Rule Citation Regarding Change
δ_{air}	Ambient air mixing zone height (cm)	200	No	NA
L_{gw}	Depth to groundwater = $h_{cap} + h_v$ (cm)	305	Tier 2, 3	§350.75(c) and (d)
D^{eff}_{ws}	Effective diffusivity above water table (cm^2/s)	COC and affected property specific	Tier 2, 3	§350.73(e) and §350.75(c) and (d)
D^{eff}_{cap}	Effective diffusivity in the capillary fringe (cm^2/s)	COC and affected property specific	Tier 2, 3	§350.73(e) and §350.75(c) and (d)
D^{eff}_{s}	Effective diffusivity in vadose zone soils (cm^2/s)	COC and affected property specific	Tier 2,3	§350.73(e) and §350.75(c) and (d)
h_{cap}	Thickness of capillary fringe (cm)	5	Tier 2, 3	§350.75(c) and (d)
h_v	Thickness of vadose zone (cm)	300	Tier 2, 3	§350.75(c) and (d)
W_g	Width of groundwater source in the direction to the closest off-site property line from the groundwater source (cm)			§350.75(c) and (d)
	• 0.5 acre source	4,500	Tier 2, 3	
	• 30 acre source	34,800	Tier 2, 3	
θ_{acap}	Volumetric air content of capillary fringe soils (cm^3-air/cm^3-soil)	0.037	Tier 2, 3	§350.75(c) and (d)
θ_{wcap}	Volumetric water content of capillary fringe soils (cm^3-water/cm^3-soil)	0.333	Tier 2, 3	§350.75(c) and (d)
D^{air}	Diffusion coefficient in air (cm^2/s)	(Figure: 30 TAC §350.73(e))	No	NA
D^{wat}	Diffusion coefficient in water (cm^2/s)	(Figure: 30 TAC §350.73(e))	No	NA
DF	Surface Water Dilution Factor	NA	Tier 2, 3	§350.75(i)(4)

Soil PCL Equation: ${}^{Tot}Soil_{Comb}$

Exposure Pathway Description: Combined equation for ingestion of surface soil + dermal contact with surface soil + inhalation of surface soil volatiles and particulates + consumption of garden vegetables grown in contaminated surface soil
Source Medium: Surface soils
Exposure Medium: Surface soil and air (and vegetables for residential land use only).

Residential

$$ {}^{Tot}Soil_{Comb} = \frac{1}{\left[\frac{1}{{}^{Air}Soil_{Inh-VP}}\right] + \left[\frac{1}{{}^{Soil}Soil_{Derm}}\right] + \left[\frac{1}{{}^{Soil}Soil_{Ing}}\right] + \left[\left(\frac{1}{{}^{Veg}Soil_{Ing-Inorg}}\right) or \left(\frac{1}{{}^{Veg}Soil_{Ing-Org}}\right)\right]} $$

Commercial/Industrial Worker

$$ {}^{Tot}Soil_{Comb} = \frac{1}{\left(\frac{1}{{}^{Air}Soil_{Inh-VP}}\right) + \left(\frac{1}{{}^{Soil}Soil_{Derm}}\right) + \left(\frac{1}{{}^{Soil}Soil_{Ing}}\right)} $$

Soil PCL Equation: $^{Air}Soil_{Inh\text{-}VP}$

Exposure Pathway Description: Inhalation of surface soil volatiles and particulates
Source Medium: Surface soils
Exposure Medium: Air

$$^{Air}Soil_{Inh-VP} = \frac{^{Air}RBEL_{Inh}}{VF_{ss} + PEF}$$ *(See Eq. RBEL-1, Figure: 30 TAC §350.74(a))*

Soil PCL Equation: $^{Soil}Soil_{Derm}$

Exposure Pathway Description: Dermal contact with surface soil
Source Medium: Surface soil
Exposure Medium: Surface soil

$$^{Soil}Soil_{Derm} = ^{Soil}RBEL_{Derm}$$ *(See Eq. RBEL-2, Figure: 30 TAC §350.74(a))*

Exposure Pathway Description: Ingestion of surface soil
Source Medium: Surface soil
Exposure Medium: Surface soil

$$^{Soil}Soil_{Ing} = ^{Soil}RBEL_{Ing}$$ *(See Eq. RBEL – 3, Figure: 30 TAC §350.74(a))*

Soil PCL Equation: $^{Veg}Soil_{Ing\text{-}Inorg}$ & $^{Veg}Soil_{Ing\text{-}Org}$
(for residential land use only).

Exposure Pathway Description: Consumption of garden vegetables grown in contaminated surface soil
Source Medium: Surface soil
Exposure Medium: Vegetables

$$^{Veg}Soil_{Ing-Inorg} = \frac{1}{\frac{Br_{abg}}{^{AbgVeg}RBEL_{Ing}} + \frac{Br_{bg}}{^{bgVeg}RBEL_{Ing}}}$$ *(See Eq. RBEL – 7, Figure: 30 TAC §350.74(a))*

$$^{Veg}Soil_{Ing-Org} = \frac{\left(^{BgVeg}RBEL_{Ing}\right)\left(Ks_{Veg}\right)}{\left(RCF\right)\left(VG_{bg}\right)}$$ *(See Eq. RBEL – 7, Figure: 30 TAC §350.74(a))*

Soil PCL Equation: $^{Air}Soil_{Inh-V}$

Exposure Pathway Description: Inhalation of subsurface soil volatiles
Source Medium: Subsurface soils
Exposure Medium: Air

$$^{Air}Soil_{Inh-V} = \frac{^{Air}RBEL_{Inh}}{VF_{ss}}$$ *(See Eq. RBEL – 1, Figure: 30 TAC §350.74(a))*

Volatilization Factor: VF_{ss}

Where VF_{ss} is the smaller of the two following VF_{ss} values

$$VF_{ss}\left[\frac{mg/m^3 - air}{mg/kg - Soil}\right] = \frac{2\rho_b D_A}{(Q/C)\left[3.14 D_A{}^{\tau}\right]^{\frac{1}{2}}} \cdot \left(\frac{10^4 cm^2}{m^2}\right)$$

$$D_A = \left[\frac{\theta_{as}^{3.33} D^{air} H' + \theta_{ws}^{3.33} D^{wat}}{\left[\theta_{ws} + K_d P_b + \theta_{as} H'\right]\theta_T^2}\right]$$

or

$$VF_{ss}\left[\frac{mg/m^3 - air}{mg/kg - soil}\right] = \frac{P_b d_s}{(Q/C)\tau} \cdot \left(\frac{10^4 cm^2}{m^2}\right)$$

Particulate Emission Factor: PEF

$$PEF\left[\frac{mg/m^3 - air}{mg/kg - soil}\right] = \frac{(0.036)(1-V)\left(\frac{U_m}{U_1}\right)^3 F(x)}{(Q/C)(3600 s/hr)}$$

Soil-to-Groundwater PCL Equation: ^{GW}Soil

Exposure Pathway Description: Soil leachate to groundwater
Source Medium: Surface and subsurface soils
Exposure Medium: Groundwater

$$^{GW}Soil = \frac{\left(GroundwaterPCL^{*}\right)\cdot LDF}{K_{sw}}$$

$$K_{sw}\left[\frac{\left(mg/L - H_2O\right)}{\left(mg/kg - soil\right)}\right] = \frac{\rho_b}{\theta_{ws} + K_d\rho_b + H'\theta_{as}}$$

*Critical groundwater PCL as determined in accordance with §350.78 of this title (relating to Determination of Critical PCLs) or attenuation action level as determined in accordance with §350.33(f)(4)(D) of this title (relating to Remedy Standard B).

Theoretical Residual Soil Saturation Limit PCL ($Soil_{Res}$)

$$Soil_{Res}\left(mg/kg\right) = \left(\frac{Res.sat \times \theta_\tau \times p}{\rho_b}\right) x\ 1{,}000{,}000\ mg/kg$$

Term	*COC Chemical/Physical and Affected Property Parameters Definition*	*Tier 1 Defaults*	*Change to Tier 1 Default Allowed?*	*Rule Citation Regarding Change*
Br_{Abg}	Soil-to-above ground plant biotransfer factor (g soil/g dry weight plant tissue)	(Figure: 30 TAC §350.73(e))	Tier 2, 3	§350.73(e)(2)
Br_{Bg}	Soil-to-below ground plant biotransfer factor (g soil/g dry weight plant tissue)	(Figure: 30 TAC §350.73(e))	Tier 2, 3	§350.73(e)(2)
RCF	Ratio of concentration in roots to concentration in soil pore water (mg/kg) (μg/ml)	$\frac{(10^{((0.77 \times \log K_{ow})-1.52)}+0.82)}{0.222}$	Special Consideration	§350.73(e)
log K_{ow}	Octanol-water partition coefficient	(Figure: 30 TAC §350.73(e))	Special Consideration	§350.73(e)
Ks_{Veg}	Soil-water partition coefficient (mL/g) = K_{oc} x f_{oc}	chemical specific	Tier 2, 3	§350.73(e) and §350.75(c) and (d)
VG_{bg}	Below ground vegetable correction factor (unitless)	0.01	No	NA
D_A	Apparent diffusivity (cm^2/sec)	chemical specific	Tier 2, 3	§350.73(e) and §350.75(c) and (d)
ρ_b	Soil bulk density (g/cm^3)	1.67	Tier 2, 3	§350.75(c) and (d)

Term	*COC Chemical/Physical and Affected Property Parameters Definition*	*Tier 1 Defaults*	*Change to Tier 1 Default Allowed?*	*Rule Citation Regarding Change*
Q/C	Inverse of mean concentration in air at center of affected soil area ([g/m^2-s]/[kg/m^3])			§350.75(c) and (d)
	Default location assumed: • 0.5 acre source • 30 acre source	Houston 79.25 40.76	Tier 2, 3 Tier 2, 3 Tier 2, 3	
	Tier 2, 3 may estimate Q/C from the following equation for Houston: Q/C=-9.3087 ln (x) + 69.989, (where x = source area acreage), or other equation representative of Q/C for other city more representative of the affected property conditions and acceptable to the executive director (see USEPA Soil Screening Level Guidance: Technical Background Document, May 1996, EPA/540/R-95/128)			
τ	Exposure interval (s)	9.5×10^8	Tier 2, 3	§350.74(j)(2)
θ_{ws}	Volumetric water content of vadose zone soils (cm^3-water/cm^3-soil)	0.16	Tier 2, 3	§350.75(c) and (d)
θ_{as}	Volumetric air content of vadose zone soils (cm^3-air/cm^3-soil) $=\theta_T-\theta_{ws}$	0.21	Tier 2, 3	§350.75(c) and (d)
D^{air}	Diffusion coefficient in air (cm^2/s)	(Figure: 30 TAC §350.73(e))	No	NA
D^{wat}	Diffusion coefficient in water (cm^2/s)	(Figure: 30 TAC §350.73(e))	No	NA
H′	Dimensionless Henry's Law Constant	(Figure: 30 TAC §350.73(e))	No	NA
H	Henry's Law Constant (atm-m^3/mole) (H=H′RT)	(Figure: 30 TAC §350.73(e))	No	NA
K_d	Soil-water partition coefficient (cm^3-water/g-soil) • for organics • for inorganic	(Figure: 30 TAC §350.73(e)) $k_d = K_{oc} \cong f_{oc}$ k_d = pH dependent value	Tier 2, 3	§350.73(e) and (Figures: 30 TAC §350.73(e)(1)(A), (B), (C))
K_{oc}	Soil organic carbon-water partition coefficient (cm^3-water/g-carbon)	(Figure: 30 TAC §350.73(e))	Tier 2, 3	§350.73(e) and (Figure: 30 TAC §350.73(e)(1)(B))
f_{oc}	Fraction of organic carbon in soil (g-carbon/g-soil) • VF_{ss} • Ks_{veg} • K_{sw}	0.008 0.008 0.002	 Tier 2, 3 Tier 2, 3	 §350.75(c) and (d) §350.75(c) and (d)
θ_T	Total soil porosity = 1 - (ρ_b/ρ_s) (cm^3-pore space/cm^3-soil)	0.37	Tier 2, 3	§350.75(c) and (d)

ρ_s	Particle density (g/cm^3)	2.65	Tier 2, 3	§350.75(c) and (d)
d_s	Thickness of affected surficial soil (cm)	305	Tier 2, 3	§350.75(c) and (d)
V	Fraction vegetative cover (unitless)	0.5	Tier 2, 3	§350.75(c) and (d)
U_m	Mean annual windspeed at 7 m height (m/s)	4.8	Tier 2, 3	§350.75(c) and (d)
U_t	Equivalent threshold value of windspeed at 7 m height (m/s)	11.32	Tier 2, 3	§350.75(c) and (d)

Tier 1 PCL Equations

Term	*COC Chemical/Physical and Affected Property Parameters Definition*	*Tier 1 Defaults*	*Change to Tier 1 Default Allowed?*	*Rule Citation Regarding Change*
F(x)	Function dependent on (U_t/U_m) derived using Cowherd et. al. (1985) (unitless)	0.224	Tier 2, 3	§350.75(c) and (d)
R	Universal Gas Constant (atm m^3 mol^{-1} °K^{-1})	8.206 x 10^{-5}	No	NA
T	Temperature (°K) = 273 + EC	293	No	NA
K_{sw}	Soil-leachate partition factor for COC (mg/L-water/mg/kg-soil)	property-specific	Tier 2, 3	§350.73(e) and §350.75(c) and (d)
LDF	Leachate Dilution Factor			
	0.5 acre source area	20	Tier 2, 3	§350.75(c) and (d)
	30 acre source area	10	Tier 2, 3	§350.75(c) and (d)
Res.sat	The residual saturation limit where the NAPL becomes mobile (cm^3/cm^3) Res.sat = $\frac{10{,}000 \text{ mg/kg} \times \rho_b}{1{,}000{,}000 \text{ mg/kg} \times p \times \theta_T^{[\theta T]}}$	0.04514	Tier 2, 3	§350.75(c) and (d)
p	The density of the NAPL (g/cm^3)	1	Tier 2, 3	§350.75(c) and (d)

Air Source Medium Exposure Pathway PCL Equation

PCL Eq.: $^{Air}Air_{Inh}$
Exposure Pathway Description: Inhalation of air
Source Medium: Air
Exposure Medium: Air

$$^{Air}Air_{Inh} = {}^{Air}RBEL_{Inh}$$ *(See Eq. RBEL-1, Figure: 30 TAC §350.74(a))*

Surface Water Exposure Pathway PCL Equation

PCL Eq.: ^{SW}SW
Exposure Pathway Description: Aquatic life and human health protection ($^{SW}RBEL$) and ecological protection ($^{SW}SW_{Eco}$)
Source Medium: Surface water
Exposure Medium: Surface water

$$^{SW}SW = \text{the lessor of } {}^{SW}RBEL \text{ and } {}^{SW}SW_{ECO}$$

(see RBEL-6, Figure 30 TAC §350.74(a), §350.74(h), and §350.77(a))

Figure: 30 TAC §350.76(c)(3)

Equation for Adult Lead Exposure Commercial/Industrial Land Use (Tier 1)
$^{Soil}Soil_{Ing}=^{Soil}RBEL_{Ing}$
$$^{Soil}RBEL_{Ing}(\mu g/g)=\frac{\left(PbB_{95}fetal/\left(R\times\left(GSD_i\right)^{1.645}\right)\right)-PbB0}{BKSF\times\left(IR_{sd}\times AF_{sd}\times EF_{sd}/365\right)}$$

Parameter	Definition (units)	Default
PbB_{95} fetal	95th Percentile PbB in Fetus (µg/dL)	10
R	Mean Ratio of Fetal to Maternal PbB	0.9
GSD_i	Individual Geometric Standard Deviation	1.91
PbB0	Baseline Blood Lead Value (µg/dL)	1.64
BKSF	Biokinetic Slope Factor (µg/dL per µg/day)	0.4
IR_{sd}	Soil/Dust Ingestion Rate (g/day)	0.05
EF_{sd}	Soil/Dust Exposure Frequency (days/yr)	250
AF_{sd}	Absolute Absorption Fraction of Lead in Soil/Dust	0.10

Figure: 30 TAC §350.76(c)(4)

Equation for Adult Lead Exposure Commercial/Industrial Land Use (Tiers 2 & 3 only)

$$^{Soil}Soil_{Ing} = {}^{Soil}RBEL_{Ing}$$

$$^{Soil}RBEL_{Ing}(\mu g/g) = \frac{\left(PbB_{95}\,fetal/\left(R\times(GSD_i)^{1.645}\right)\right)-PbB0}{BKSF\times\left(\left(IR_{sf}\times AF_s\times EF_{s/365}\right)+\left(K_{sd}\times IR_d\times AF_d\times EF_d/365\right)\right)}$$

Parameter	Definition (units)	Defaults
PbB_{95} fetal	95th Percentile PbB in Fetus (µg/dL)	10
R	Mean Ratio of Fetal to Maternal PbB	0.9
GSD_i	Individual Geometric Standard Deviation	1.91
Parameter	**Definition (units)**	**Defaults**
PbB0	Baseline Blood Lead Value (µg/dL)	1.64
BKSF	Biokinetic Slope Factor (µg/dL per µg/day)	0.4
IR_s	Soil Ingestion Rate (g/day)	0.025
IR_d	Dust Ingestion Rate (g/day)	0.025
K_{sd}	Ratio of Concentration in Dust to that in Soil	***
EF_s	Soil Exposure Frequency (days/yr)	250
EF_d	Dust Exposure Frequency (days/yr)	250
AF_s	Absolute Absorption Fraction of Lead in Soil	0.10
AF_d	Absolute Absorption Fraction of Lead in Dust	0.10

***Based on direct measurement data on the concentrations of lead in both soil and dust at the affected property.

Figure: 30 TAC §350.76(f)(3)

Equations for Calculating Cancer Slope Factors and Unit Risk Factors for Carcinogenic PAHs

$$SF_{PAH} = (SF_{B(a)P})\ (RPF_{PAH})$$

where: SF_{PAH} = adjusted cancer slope factor for a PAH $(mg/kg\text{-}day)^{-1}$

$SF_{B[a]P}$ = cancer slope factor for benzo{a}pyrene $(mg/kg\text{-}day)^{-1}$

RPF_{PAH} = relative potency factor for a PAH in Figure 30 TAC §350.76(f)(2) (unitless)

$$URF_{PAH} = (URF_{B(a)P})\ (RPF_{PAH})$$

where: URF_{PAH} = adjusted inhalation unit risk factor for a PAH $(\mu g/m^3)^{-1}$

$URF_{B[a]P}$ = inhalation unit risk factor for benzo{a}pyrene $(\mu g/m^3)^{-1}$

RPF_{PAH} = relative potency factor for a PAH in (Figure 30 TAC §350.76(f)(2)) (unitless)

Figure: 30 TAC §350.76(g)(2)

Hydrocarbon Fractions and Toxicity Factors		
Aliphatic Hydrocarbon Fraction	Surrogate for Oral RfD	Surrogate for Inhalation RfC
C_6	n-hexane	n-hexane[1] commercial hexane[2]
$>C_6$-C_8	n-hexane	n-hexane[1] commercial hexane[2]
$>C_8$-C_{10}	C9-C17 aliphatics	dearomatized white spirits
$>C_{10}$-C_{12}	C9-C17 aliphatics	dearomatized white spirits
$>C_{12}$-C_{16}	C9-C17 aliphatics	dearomatized white spirits
$>C_{16}$-C_{21}	white mineral oils	----
$>C_{16}$-C_{21} (for transformer mineral oil releases only)	transformer mineral oil	----
$>C_{21-35}$ [3]	white mineral oil	----
$>C_{21}$-C_{35} (for transformer mineral oil releases only)	transformer mineral oil	----
Aromatic Hydrocarbon Fraction	**Surrogate for Oral RfD**	**Surrogate for Inhalation RfC**
$>C_{7-8}$	ethylbenzene	ethylbenzene
$>C_8$-C_{10}	multiple aromatic compounds	high flash aromatic naphtha
$>C_{10}$-C_{12}	multiple aromatic compounds	high flash aromatic naphtha
$>C_{12}$-C_{16}	multiple aromatic compounds	multiple aromatic compounds
$>C_{16}$-C_{21}	pyrene	----
$>C_{21}$-C_{35} [3]	pyrene	----

Footnotes:

1. For mixtures with greater than 53% n-hexane content.
2. For mixtures with less than or equal to 53% n-hexane content.
3. The person may truncate the analysis at C_{28} when there does not appear to be significant mass of $>C_{28}$ based on the gas chromatogram and the product is anticipated to be a lighter hydrocarbon (e.g., gasoline, diesel, not transformer mineral oil, or used motor oil).

Figure: 30 TAC §350.77(b)

TIER 1: EXCLUSION CRITERIA CHECKLIST

This exclusion criteria checklist is intended to aid the person and the TCEQ in determining whether or not further ecological evaluation is necessary at an affected property where a response action is being pursued under the Texas Risk Reduction Program (TRRP). Exclusion criteria refer to those conditions at an affected property which preclude the need for a formal ecological risk assessment (ERA) because there are **incomplete or insignificant ecological exposure pathways** due to the nature of the affected property setting and/or the condition of the affected property media. This checklist (and/or a Tier 2 or 3 ERA or the equivalent) must be completed by the person for all affected property subject to the TRRP. The person should be familiar with the affected property but need not be a professional scientist in order to respond, although some questions will likely require contacting a wildlife management agency (i.e., Texas Parks and Wildlife Department or U.S. Fish and Wildlife Service). The checklist is designed for general applicability to all affected property; however, there may be unusual circumstances which require professional judgement in order to determine the need for further ecological evaluation (e.g., cave-dwelling receptors). In these cases, the person is strongly encouraged to contact TCEQ before proceeding.

Besides some preliminary information, the checklist consists of three major parts, **each of which must be completed unless otherwise instructed.** PART I requests affected property identification and background information. PART II contains the actual exclusion criteria and supportive information. PART III is a qualitative summary statement and a certification of the information provided by the person. **Answers should reflect existing conditions and should not consider future remedial actions at the affected property.** Completion of the checklist should lead to a logical conclusion as to whether further evaluation is warranted. Definitions of terms used in the checklist have been provided and users are strongly encouraged to familiarize themselves with these definitions before beginning the checklist.

Name of Facility:

Affected Property Location:

Mailing Address:

TCEQ Case Tracking #s:

Solid Waste Registration #s:

Voluntary Cleanup Program #:

EPA I.D. #s:

Definitions[1]

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1 These definitions were taken from 30 TAC §350.4 and may have both ecological and human health applications. For the purpose of this checklist, it is understood that only the ecological applications are of concern.

Affected property - The entire area (i.e., on-site and off-site; including all environmental media) which contains releases of chemicals of concern at concentrations equal to or greater than the assessment level applicable for residential land use and groundwater classification.

Assessment level - A critical protective concentration level for a chemical of concern used for affected property assessments where the human health protective concentration level is established under a Tier 1 evaluation as described in §350.75(b) of this title (relating to Tiered Human Health Protective Concentration Level Evaluation), except for the protective concentration level for the soil-to-groundwater exposure pathway which may be established under Tier 1, 2, or 3 as described in §350.75(i)(7) of this title, and ecological protective concentration levels which are developed, when necessary, under Tier 2 and/or 3 in accordance with §350.77(c) and/or (d), respectively, of this title (relating to Ecological Risk Assessment and Development of Ecological Protective Concentration Levels).

Bedrock - The solid rock (i.e., consolidated, coherent, and relatively hard naturally formed material that cannot normally be excavated by manual methods alone) that underlies gravel, soil or other surficial material.

Chemical of concern - Any chemical that has the potential to adversely affect ecological or human receptors due to its concentration, distribution, and mode of toxicity. Depending on the program area, chemicals of concern may include the following: solid waste, industrial solid waste, municipal solid waste, and hazardous waste as defined in Texas Health and Safety Code, §361.003, as amended, hazardous constituents as listed in 40 Code of Federal Regulations Part 261, Appendix VIII, as amended; constituents on the groundwater monitoring list in 40 Code of Federal Regulations Part 264, Appendix IX, as amended; constituents as listed in 40 CFR Part 258 Appendices I and II, as amended; pollutant as defined in Texas Water Code, §26.001, as amended; hazardous substance as defined in Texas Health and Safety Code, §361.003, as amended, and the Texas Water Code, §26.263, as amended; regulated substance as defined in Texas Water Code, §26.342, as amended and §334.2 of this title (relating to Definitions), as amended; petroleum product as defined in Texas Water Code, §26.342, as amended and §334.122(b)(12) of this title (relating to Definitions for ASTs), as amended; other substances as defined in Texas Water Code, §26.039(a), as amended; and daughter products of the aforementioned constituents.

Community - An assemblage of plant and animal populations occupying the same habitat in which the various species interact via spatial and trophic relationships (e.g., a desert community or a pond community).

Complete exposure pathway - An exposure pathway where a human or ecological receptor is exposed to a chemical of concern via an exposure route (e.g., incidental soil ingestion, inhalation of volatiles and particulates, consumption of prey, etc).

De minimus - The description of an area of affected property comprised of one acre or less where the ecological risk is considered to be insignificant because of the small extent of contamination, the absence of protected species, the availability of similar unimpacted habitat nearby, and the lack of adjacent sensitive environmental areas.

Ecological protective concentration level - The concentration of a chemical of concern at the point of exposure within an exposure medium (e.g., soil, sediment, groundwater, or surface water) which is determined in accordance with §350.77(c) or (d) of this title (relating to Ecological Risk Assessment and Development of Ecological Protective Concentration Levels) to be protective for ecological receptors. These concentration levels are primarily intended to be protective for more mobile or wide-ranging ecological receptors and, where appropriate, benthic invertebrate communities within the waters in the state. These concentration levels are not intended to be directly protective of receptors with limited mobility or range (e.g., plants, soil invertebrates, and small rodents), particularly those residing within active areas of a facility, unless these receptors are

threatened/endangered species or unless impacts to these receptors result in disruption of the ecosystem or other unacceptable consequences for the more mobile or wide-ranging receptors (e.g., impacts to an off-site grassland habitat eliminate rodents which causes a desirable owl population to leave the area).

Ecological risk assessment - The process that evaluates the likelihood that adverse ecological effects may occur or are occurring as a result of exposure to one or more stressors; however, as used in this context, only chemical stressors (i.e., COCs) are evaluated.

Environmental medium - A material found in the natural environment such as soil (including non-waste fill materials), groundwater, air, surface water, and sediments, or a mixture of such materials with liquids, sludges, gases, or solids, including hazardous waste which is inseparable by simple mechanical removal processes, and is made up primarily of natural environmental material.

Exclusion criteria - Those conditions at an affected property which preclude the need to establish a protective concentration level for an ecological exposure pathway because the exposure pathway between the chemical of concern and the ecological receptors is not complete or is insignificant.

Exposure medium - The environmental medium or biologic tissue in which or by which exposure to chemicals of concern by ecological or human receptors occurs.

Facility - The installation associated with the affected property where the release of chemicals of concern occurred.

Functioning cap - A low permeability layer or other approved cover meeting its design specifications to minimize water infiltration and chemical of concern migration, and prevent ecological or human receptor exposure to chemicals of concern, and whose design requirements are routinely maintained.

Landscaped area - An area of ornamental, or introduced, or commercially installed, or manicured vegetation which is routinely maintained.

Off-site property (off-site) - All environmental media which is outside of the legal boundaries of the on-site property.

On-site property (on-site) - All environmental media within the legal boundaries of a property owned or leased by a person who has filed a self-implementation notice or a response action plan for that property or who has become subject to such action through one of the agency's program areas for that property.

Physical barrier - Any structure or system, natural or manmade, that prevents exposure or prevents migration of chemicals of concern to the points of exposure.

Point of exposure - The location within an environmental medium where a receptor will be assumed to have a reasonable potential to come into contact with chemicals of concern. The point of exposure may be a discrete point, plane, or an area within or beyond some location.

Protective concentration level - The concentration of a chemical of concern which can remain within the source medium and not result in levels which exceed the applicable human health risk-based exposure limit or ecological protective concentration level at the point of exposure for that exposure pathway.

Release - Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, with the exception of:

(A) A release that results in an exposure to a person solely within a workplace, concerning a claim that the person may assert against the person's employer;

(B) An emission from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

(C) A release of source, by-product, or special nuclear material from a nuclear incident, as those terms are defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011 *et seq.*), if the release is subject to requirements concerning financial protection established by the Nuclear Regulatory Commission under §170 of that Act;

(D) For the purposes of the environmental response law §104, as amended, or other response action, a release of source, by-product, or special nuclear material from a processing site designated under §102(a)(1) or §302(a) of the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. §7912 and §7942), as amended; and

(E) The normal application of fertilizer.

Sediment - Non-suspended particulate material lying below surface waters such as bays, the ocean, rivers, streams, lakes, ponds, or other similar surface water body (including intermittent streams). Dredged sediments which have been removed from below surface water bodies and placed on land shall be considered soils.

Sensitive environmental areas - Areas that provide unique and often protected habitat for wildlife species. These areas are typically used during critical life stages such as breeding, hatching, rearing of young, and overwintering. Examples include critical habitat for threatened and endangered species, wilderness areas, parks, and wildlife refuges.

Source medium - An environmental medium containing chemicals of concern which must be removed, decontaminated and/or controlled in order to protect human health and the environment. The source medium may be the exposure medium for some exposure pathways.

Stressor - Any physical, chemical, or biological entity that can induce an adverse response; however, as used in this context, only chemical entities apply.

Subsurface soil - For human health exposure pathways, the portion of the soil zone between the base of surface soil and the top of the groundwater-bearing unit(s). For ecological exposure pathways, the portion of the soil zone between 0.5 feet and 5 feet in depth.

Surface cover - A layer of artificially placed utility material (e.g., shell, gravel).

Surface soil - For human health exposure pathways, the soil zone extending from ground surface to 5 feet in depth; or to the top of the uppermost groundwater-bearing unit or bedrock, whichever is less in depth. For ecological exposure pathways, the soil zone extending from ground surface to 0.5 feet in depth.

Surface water - Any water meeting the definition of surface water in the state as defined in §307.3 of this title (relating to Abbreviations and Definitions), as amended.

PART I. Affected Property Identification and Background Information

1) Provide a description of the specific area of the response action and the nature of the release. Include estimated acreage of the affected property and the facility property, and a description of the type of facility

and/or operation associated with the affected property. Also describe the location of the affected property with respect to the facility property boundaries and public roadways.

Attach available USGS topographic maps and/or aerial or other affected property photographs to this form to depict the affected property and surrounding area. Indicate attachments:

Q Topo map Q Aerial photo Q Other

2) Identify environmental media known or suspected to contain chemicals of concern (COCs) at the present time. Check all that apply:

Known/Suspected COC Location	Based on sampling data?	
Q Soil ≤5 ft below ground surface	Q Yes	Q No
Q Soil >5 ft below ground surface	Q Yes	Q No
Q Groundwater	Q Yes	Q No
Q Surface Water/Sediments	Q Yes	Q No

Explain (previously submitted information may be referenced):

3) Provide the information below for the nearest surface water body which has become or has the potential to become impacted from migrating COCs via surface water runoff, air deposition, groundwater seepage, etc. Exclude wastewater treatment facilities and storm water conveyances/impoundments authorized by permit. Also exclude conveyances, decorative ponds, and those portions of process facilities which are:

a. Not in contact with surface waters in the State or other surface waters which are ultimately in contact with surface waters in the State; and

b. Not consistently or routinely utilized as valuable habitat for natural communities including birds, mammals, reptiles, etc.

The nearest surface water body is _____ feet/miles from the affected property and is named _____. The water body is best described as a:

Q freshwater stream: _____ perennial (has water all year)
_____ intermittent (dries up completely for at least 1 week a year)
_____ intermittent with perennial pools
Q freshwater swamp/marsh/wetland
Q saltwater or brackish marsh/swamp/wetland
Q reservoir, lake, or pond; approximate surface acres:
Q drainage ditch
Q tidal stream Q bay Q estuary
Q other; specify

Is the water body listed as a State classified segment in Appendix C of the current Texas Surface Water Quality Standards; §§307.1 - 307.10?

Q Yes Segment # _____ Use Classification:

Q No

If the water body is not a State classified segment, identify the first downstream classified segment.

Name:

Segment #:

Use Classification:

As necessary, provide further description of surface waters in the vicinity of the affected property:

PART II. Exclusion Criteria and Supportive Information
Subpart A. Surface Water/Sediment Exposure

1) Regarding the affected property where a response action is being pursued under the TRRP, have COCs migrated and resulted in a release or imminent threat of release to either surface waters or to their associated sediments via surface water runoff, air deposition, groundwater seepage, etc.? Exclude wastewater treatment facilities and storm water conveyances/impoundments authorized by permit. Also exclude conveyances, decorative ponds, and those portions of process facilities which are:

a. Not in contact with surface waters in the State or other surface waters which are ultimately in contact with surface waters in the State; and

b. Not consistently or routinely utilized as valuable habitat for natural communities including birds, mammals, reptiles, etc.

Q Yes Q No

Explain:
If the answer is Yes to Subpart A above, the affected property does not meet the exclusion criteria. However, complete the remainder of Part II to determine if there is a complete and/or significant soil exposure pathway, then complete PART III - Qualitative Summary and Certification. If the answer is No, go to Subpart B.

Subpart B. Affected Property Setting

In answering "Yes" to the following question, it is understood that the affected property is not attractive to wildlife or livestock, including threatened or endangered species (i.e., the affected property does not serve as valuable habitat, foraging area, or refuge for ecological communities). (May require consultation with wildlife management agencies.)

1) Is the affected property wholly contained within contiguous land characterized by: pavement, buildings, landscaped area, functioning cap, roadways, equipment storage area, manufacturing or process area, other surface cover or structure, or otherwise disturbed ground?

Q Yes Q No

Explain:

If the answer to Subpart B above is Yes, the affected property meets the exclusion criteria, assuming the answer to Subpart A was No. Skip Subparts C and D and complete PART III - Qualitative Summary and Certification. If the answer to Subpart B above is No, go to Subpart C.

Subpart C. Soil Exposure

1) Are COCs which are in the soil of the affected property solely below the first 5 feet beneath ground surface **or** does the affected property have a physical barrier present to prevent exposure of receptors to COCs in surface soil?

Q Yes Q No

Explain:

If the answer to Subpart C above is Yes, the affected property meets the exclusion criteria, assuming the answer to Subpart A was No. Skip Subpart D and complete PART III - Qualitative Summary and Certification. If the answer to Subpart C above is No, proceed to Subpart D.

Subpart D. *De Minimus* Land Area

In answering "Yes" to the question below, it is understood that all of the following conditions apply:

□ The affected property is not known to serve as habitat, foraging area, or refuge to threatened/endangered or otherwise protected species. (Will likely require consultation with wildlife management agencies.)

□ Similar but unimpacted habitat exists within a half-mile radius.

□ The affected property is not known to be located within one-quarter mile of sensitive environmental areas (e.g., rookeries, wildlife management areas, preserves). (Will likely require consultation with wildlife management agencies.)

□ There is no reason to suspect that the COCs associated with the affected property will migrate such that the affected property will become larger than one acre.

1) Using human health protective concentration levels as a basis to determine the extent of the COCs, does the affected property consist of one acre or less and does it meet all of the conditions above?

Q Yes Q No

Explain how conditions are met/not met:

If the answer to Subpart D above is Yes, then no further ecological evaluation is needed at this affected property, assuming the answer to Subpart A was No. Complete PART III - Qualitative Summary and Certification. If the answer to Subpart D above is No, proceed to Tier 2 or 3 or comparable ERA.

PART III. Qualitative Summary and Certification (Complete in all cases.)

Attach a brief statement (not to exceed 1 page) summarizing the information you have provided in this form. This summary should include sufficient information to verify that the affected property meets or does not meet the exclusion criteria. The person should make the initial decision regarding the need for further ecological evaluation (i.e., Tier 2 or 3) based upon the results of this checklist. After review, TCEQ will make a final

determination on the need for further assessment. **Note that the person has the continuing obligation to re-enter the ERA process if changing circumstances result in the affected property not meeting the Tier 1 exclusion criteria.**

Completed by: _____ *(Typed/Printed Name)*
_____ *(Title)*

_____ *(Date)*

I believe that the information submitted is true, accurate, and complete, to the best of my knowledge.

_____ *(Typed/Printed Name of Person)*

_____ *(Title of Person)*

_____ *(Signature of Person)*

_____ *(Date Signed)*

Figure: 40 TAC §97.602(e)(1)

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.23	Change of ownership.
§97.25(a)	Application for an initial license after a change of ownership.
§97.212	Prohibiting material alteration of a license.
§97.213(a)-(b) separate penalties	Agency relocation.
§97.214(a)-(b) separate penalties	Notification procedures for reporting a change in agency telephone number and agency operating hours.
§97.215(a)(1)-(3) separate penalties	Notification procedures for reporting an agency name change.
§97.216	Change in agency certification or accreditation status.
§97.217(b)(1)-(2) separate penalties	Procedures for notifying DADS of a voluntary suspension of operations.
§97.218	Agency organizational changes.
§97.219(1)(A)-(B) separate penalties	Procedure for adding or deleting a category of service to the agency's license.
§97.220(a)(1)-(2) separate penalties	Providing services only within an agency's licensed service area.
§97.220(c)	Providing a written notification of an expansion of an agency's licensed service area.
§97.220(d)	Providing written notification of a reduction of an agency's licensed service area.
§97.220(e)	Location requirements for a branch office and an alternate delivery site in the parent agency's service area.
§97.242(a)-(b)	Maintaining a current written description of the agency's organizational structure.
§97.243(a)(1)	Designating a qualified administrator.
§97.243(a)(2)	Designating a qualified alternate administrator.
§97.243(b)(1)(A)-(G) separate penalties	Responsibilities of the administrator.
§97.243(b)(2)	Requirement that the administrator or alternate administrator be available during the agency's operating hours.
§97.243(b)(3)	Requirement that the administrator designate in writing an agency employee who must provide DADS surveyors entry to the agency.
§97.243(d)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2) separate penalties	Qualifications of the agency administrator and alternate administrator.
§97.244(b)(1)-(4) separate penalties	Conditions of the agency administrator and alternate administrator.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.244(c)(1)-(2) separate penalties	Qualifications of the supervising nurse and alternate supervising nurse.
§97.245(1)-(9) separate penalties	Adoption of written policies governing all personnel staffed by the agency.
§97.246(a)(1)-(5)-(b) separate penalties	An agency's personnel records and content of such records.
§97.248(a)-(b)(1)-(4) separate penalties	The use of volunteers in an agency.
§97.249(b)	Adoption of a written policy for the reporting of alleged acts of abuse, neglect, and exploitation of clients and reportable conduct by an employee.
§97.250(a)	Adoption of a written policy covering procedures for investigating known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.250(d)	Prohibiting an agency from retaliating against a person for filing a complaint, presenting a grievance, or providing, in good faith, information the agency.
§97.251	Adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(3)-(4) separate penalties	An agency's business records.
§97.253(a)-(d) separate penalties	Adoption of a written policy describing whether an agency will conduct drug testing of employees that describes the method and provides a copy of the policy.
§97.254	Adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Adoption of a written policy that describes an agency's plan for publicly known natural disaster preparedness.
§97.259(d)	Prohibiting use of the presurvey conference to meet training requirements for the administrator or alternate administrator.
§97.259(g)	Documentation requirements for training of the administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Adoption of a written policy that specifies the agency's client care practices.
§97.282(a)-(f)(1)-(7) separate penalties	Adoption of a written policy governing client conduct and responsibility and client rights.
§97.283	Adoption of a written policy for compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.284	Adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285(1)-(2) separate penalties	Adoption of a written policy that addresses infection control.
§97.286(a)	Adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288(a)	Adoption of a written policy that all service providers involved in the care of a client effectively coordinate the client's care.
§97.290(a)(1)-(2) separate penalties	Adoption of a written policy for ensuring that backup services are available when an agency employee or contractor is not available to deliver the services.
§97.290(b)	Adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291(1)-(2)(A)-(C) separate penalties	Adoption of a written policy for an agency's written contingency plan.
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.293(1)-(2) separate penalties	Maintaining a current list of clients for each category of service licensed.
§97.294	Adoption of a written policy for establishing a time frame for the initiation of care or services.
§97.295(f)	Documentation requirements pertaining to an agency's transfer or discharge of a client.
§97.296(a)	Adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.298	Adoption of a written policy for ensuring compliance with rules adopted by the Board of Nurse Examiners for the State of Texas in 22 TAC, Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Adoption of a written policy for ensuring compliance with rules of the Board of Nurse Examiners adopted at 22 TAC Chapters 211-226 (Nursing Continuing Education, Licensure, and Practice in the State of Texas).
§97.300(b)	Adoption of a written policy for maintaining a current medication list and a current medication administration record.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.301(a)(1)-(9)(A)-(P) separate penalties	Requirements for maintaining an agency's client records.
§97.301(b)(1)-(3) separate penalties	Adoption of a written policy for retention of records.
§97.302	Adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.303(1), (2)(A)-(B), (3)(A)-(G) separate penalties	Standards for possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(a)	Branch office compliance with the regulations of its parent agency.
§97.321(c)(1)	Providing services only within a branch office licensed service area.
§97.321(c)(3)(A)-(B) separate penalties	Providing a written notification of an expansion of a branch office service area.
§97.321(c)(4)	Providing written notification of a reduction of a branch office licensed service area.
§97.321(d)(1)-(3) separate penalties	Requirements for branch offices.
§97.321(f)	Requirement prohibiting branch offices from providing services not offered by the parent agency.
§97.322(a)	Alternate delivery site compliance with hospice services standards.
§97.322(b)	An alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(c)(1)	Providing services only within an alternate delivery site licensed service area.
§97.322(c)(3)(A)-(B) separate penalties	Providing a written notification of an expansion of an alternate delivery site service area.
§97.322(c)(4)	Providing written notification of a reduction of an alternate delivery site licensed service area.
§97.322(d)	Requirements for hospices and alternate delivery sites.
§97.401(f)	The use of home health aides.
§97.402(b) separate penalties	Requirement for implementing a home health aide training and competency program.
§97.403(b)	Restriction on use of the word "hospice" in a title or description of a facility, organization, program, service provider, or services without a license.
§97.403(f)(4)	Retaining responsibility for payment for services.
§97.403(j)	Requirement that reassessment of a client must not reduce core services.
§97.403(k)	Informing the client of the availability of short-term inpatient care.
§97.403(l)	Making and documenting efforts to arrange for visits of clergy and other members of spiritual and religious organizations.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.403(u)(4)	Specifying the persons authorized to administer medications in the client's plan of care.
§97.403(w)(5)-(6), and (8) separate penalties	Physical plant requirements in a freestanding hospice that provides inpatient care.
§97.403(w)(11)(A)-(D) separate penalties	Providing and supervising meal service in a freestanding hospice that provides inpatient care.
§97.404(e)	Requirement that an agency develops operational policies that are considerate of the principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404(f)(1)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides personal assistance services.
§97.404(g)	Adoption of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2)	Conditions and qualifications for supervision of agency personnel delivering personal assistance services.
§97.405(d)(1)-(2) separate penalties	Requirement for individual personnel files on all physicians.
§97.405(g)	A written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	An agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(j)	Ensuring that names of clients awaiting a donor transplant are entered in the recipient registry program.
§97.405(s)(1)-(7) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(v)(1)-(2) separate penalties	Development of a written preventive maintenance program for home dialysis equipment.
§97.405(z)(1)-(7) separate penalties	Adoption of policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies required of an agency that provides home dialysis services.
§97.406(1)	Adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.521(a)	Requirement for initiation of services for receiving an initial license.
§97.523(a)	Staff availability for the initial survey.
§97.523(b)	Staff availability for survey other than the initial survey.
§97.523(e)	Providing surveyor entry to the agency during regular business hours and within two hours of the surveyor's arrival at the agency.
§97.525(a)(2)	Availability of agency records.
§97.525(c)	Providing surveyor access to agency records.
§97.525(f)	Providing copies of agency records.
§97.527(b) separate penalties	Providing surveyor with audio recording of the exit conference if made by the agency.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.527(c) separate penalties	Providing surveyor with video recording of the exit conference if made by the agency.
§97.527(g)(1)	Time frame for submitting a plan of correction.
§97.527(g)(2)(A)-(D) separate penalties	Time frame for correcting a violation.
§97.527(g)(4)(A)	Time frame for submitting a revised plan of correction.

Figure: 40 TAC §97.602(e)(2)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.220(b)	Maintaining adequate staff to provide services and supervise the provision of services within the service area.
§97.241(a), (c), (d) separate penalties	Management responsibilities.
§97.243(a)(1)	Designating a qualified agency administrator.
§97.243(a)(2)	Designating a qualified agency alternate administrator.
§97.243(b)(1)-(2) separate penalties	Responsibilities of an agency administrator.
§97.243(c)(1)	Requirement to directly employ or contract with a qualified individual to serve as the supervising nurse.
§97.243(c)(2)	Requirement to designate a qualified alternate supervising nurse.
§97.243(c)(2)(A)(i)-(iv) separate penalties	Supervisory responsibilities of the supervising nurse or alternate supervising nurse.
§97.243(c)(2)(B)	Allowing the supervising nurse to be the administrator if the supervising nurse meets the qualifications of the administrator.
§97.243(c)(3)	Requirements for the supervision of physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling.
§97.243(d)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2) separate penalties	Qualifications of the agency administrator and alternate administrator.
§97.244(b)(1)-(4) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.244(c)(1)-(2) separate penalties	Qualifications of the supervising nurse and alternate supervising nurse.
§97.247(a)-(c) separate penalties	Verification of employability for unlicensed persons (criminal history checks, nurse aide registry, and employee misconduct registry).
§97.249(c)	Reporting alleged acts of abuse, neglect, and exploitation of clients.
§97.250(b) and (c)(1)-(3) separate penalties	Enforcement of an agency's written policy for investigation of known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.251	Compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(1)-(2)	An agency's financial ability to carry out its functions.
§97.259(b)-(c), (e)-(f) separate penalties	Training requirements for the agency administrator and alternate administrator.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.259(h)	Annual continuing education requirements for the agency administrator and alternate administrator.
§97.259(i)	Training requirements for an agency administrator who has not served as an administrator for 180 days or more.
§97.281	Enforcement of a written policy for client care practices.
§97.282	Compliance with an agency policy on client conduct and responsibility and client rights.
§97.283(a)(2)	Requirement for providing a written notice of the agency's policy on advance directives.
§97.284	Compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.285(1)(A)-(C), (2) separate penalties	Enforcement and compliance with the agency's written policies on infection control.
§97.286(b)	Compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287(a)(1)-(3), (b), (c) separate penalties	An agency's Quality Assessment and Performance Improvement Program.
§97.288(a)-(b) separate penalties	Compliance with an agency's written policy for coordination of services and documentation requirements.
§97.289(a)-(b) separate penalties	An agency's use of and agreement with independent contractors and arranged services.
§97.290(a)	Ensuring that backup services are available when needed.
§97.290(b)	Ensuring that clients are educated in how to access care after hours.
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.295(a)(1)-(2) separate penalties	An agency's written notification of a transfer or discharge of a client.
§97.295(b)	An agency providing written notification of a client's transfer or discharge within the required time frame.
§97.296(a)-(b)(1)-(6) separate penalties	Enforcement of an agency's policy regarding acceptance of physician delegation orders.
§97.297(1)-(2)(A)-(B) separate penalties	Adoption and enforcement of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.298	Enforcement of a written policy for ensuring compliance with the rules adopted by the Board of Nurse Examiners for the State of Texas in 22 TAC, Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.300(b)	The administration of medication.
§97.303	The possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(c)(2)	Maintaining adequate staff to provide and supervise services at a branch office.
§97.322(c)(2)	Maintaining adequate staff to provide and supervise services at an alternate delivery site.
§97.401(b)	Acceptance of a client for home health services and the initiation of services.
§97.401(d)	Requirement that qualified personnel provide and supervise all services.
§97.401(e)	Requirement that all staff providing services, delegation, and supervision be employed by or be under contract with the agency.
§97.401(g)	Age and competency of unlicensed persons providing licensed home health services.
§97.402(a)	Compliance with the Medicare Conditions of Participation (Social Security Act, Title 42, Code of Federal Regulations, Part 484.)
§97.402(c)	Compliance with §97.701(f) of this title (relating to Home Health Aides) for an agency that implements a competency evaluation program.
§97.403(a)	Compliance with the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.
§97.403(c)(1)-(8) separate penalties	Adoption of a written policy for the provision of hospice services.
§97.403(d)(1)-(3) separate penalties	Requirement and conditions of the medical director for an agency that provides hospice services.
§97.403(e)(1)(A)-(D) separate penalties	Composition of an interdisciplinary team or teams.
§97.403(e)(2)(A)-(D) separate penalties	Responsibilities of the interdisciplinary team.
§97.403(e)(4)	Designating a registered nurse to coordinate implementation of the plan of care for each client.
§97.403(f)(1)	Ensuring continuity of client and family care in home and outpatient and inpatient settings.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(f)(2)(A)-(F) separate penalties	Contract requirements for providing arranged services.
§97.403(f)(3)	Professional management responsibility for arranged services.
§97.403(f)(5)(A)-(E) separate penalties	Ensuring that inpatient care is furnished only in a licensed facility and according to contract requirements.
§97.403(g)(1)-(3) separate penalties	Time requirements for contacting the client or client's representative, performing the initial health assessment visit, and initiation of services.
§97.403(h)	Performing and making available to each client a comprehensive health assessment that identifies the client's needs.
§97.403(h)(1)	Completing the comprehensive health assessment in a timely manner.
§97.403(h)(2)(A)-(C) separate penalties	Composition of the comprehensive health assessment.
§97.403(h)(3)(A)-(B) separate penalties	Requirement for updating and revising the comprehensive health assessment.
§97.403(i)(1)-(3)(A)-(G) and (4) separate penalties	Requirements for a written plan of care.
§97.403(m)	Ensuring that all core services are provided, and requirements for using contracted staff, if necessary.
§97.403(n)(1)-(3) separate penalties	Requirements for providing nursing care and services.
§97.403(o)	Qualifications of the social worker performing hospice services.
§97.403(p)	Requirements for ensuring that general medical needs of clients are met.
§97.403(q)(1)-(4) separate penalties	Requirements for providing counseling services.
§97.403(r)	Requirements for providing services, maintaining a system for ensuring identification of client needs, communication across all disciplines, and integration of services.
§97.403(s)	Requirements for having therapy services available.
§97.403(t)	Requirements for having home health aide and homemaker services available.
§97.403(t)(1)-(2) separate penalties	Requirements for RN supervisory visits to assess aide services.
§97.403(u)(1)-(3)(A)-(D) separate penalties	Requirements for providing medical supplies, appliances, and medications, as needed, for palliation and management of terminal illness and related conditions.
§97.403(v)	Requirements that inpatient care be available for pain control, symptom management, and respite.
§97.403(w)(1)(A)-(B) separate penalties	Requirements for having on-site 24-hour nursing services provided by RNs and LVNs.
§97.403(w)(2)	Having a written plan in the event of a disaster.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(w)(3)	Meeting all federal, state, and local laws, regulations, and codes pertaining to health and safety.
§97.403(w)(4)(A)-(B) separate penalties	Meeting the National Fire Protection Association Life Safety Code for fire in buildings and structures.
§97.403(w)(9)	Having available at all times a quantity of linen essential for proper care of clients and requirements to prevent the spread of infection on linens.
§97.403(w)(10)	Making provisions for isolating clients with infectious diseases.
§97.403(w)(12)(A)-(I) separate penalties	Methods and procedures for dispensing and administering medications.
§97.404(c)	Qualifications of agency staff performing personal assistance services.
§97.404(d)(1)-(4)	Tasks authorized under a personal assistance services license category.
§97.404(h)	Performance of gastrostomy tube feedings and medication administration for an agency that provides personal assistance services.
§97.405(a)	Requirements for agencies that provide peritoneal dialysis or hemodialysis services.
§97.405(c)(1)-(2) separate penalties	Qualifications and responsibilities of the medical director for an agency that provides home dialysis services.
§97.405(e)(1)(A)-(C) separate penalties	Provision and supervision of nursing services for an agency that provides home dialysis services.
§97.405(e)(2)	Provision of nutritional counseling for an agency that provides home dialysis services.
§97.405(e)(3)	Provision of medical social services for an agency that provides home dialysis services.
§97.405(f)(1)(A)-(R)(i)-(iv) separate penalties	Requirements for orientation and training of personnel providing direct care to clients receiving home dialysis services.
§97.405(f)(2)(a)-(G) separate penalties	Requirement for an orientation and skills education period for licensed nurses.
§97.405(i)	Requirement that an agency coordinate the exchange of medical and other important information when transferring a home dialysis client to a health-care facility for treatment.
§97.405(k)	Requirement for routine hepatitis testing of home dialysis clients and agency employees providing dialysis care.
§97.405(k)(1)(A)-(C) separate penalties	Requirements for hepatitis B screening and vaccinations for staff.
§97.405(k)(2)(A)-(E) separate penalties	Requirements for hepatitis B screening and vaccinations for clients.
§97.405(l)	Requirements for employees providing direct care to clients to have a current CPR certification.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(m)	Requirement for initial admission assessment of a client for home dialysis services.
§97.405(n)	Requirement for development of a long-term program for a client receiving home dialysis services.
§97.405(o)	Requirement that the agency conducts a history and physical of a home dialysis client at admission and annually.
§97.405(p)(1)-(2) separate penalties	Requirement for physician orders for home self-assisted dialysis treatment.
§97.405(q)(1)-(7) separate penalties	Requirements for development and implementation of a care plan for a home dialysis client.
§97.405(r)	Requirement for medication administration by licensed personnel for an agency that provides home dialysis services.
§97.405(t)(1)-(4) separate penalties	Requirements for use of water in the home dialysis setting.
§97.405(v)(1)(A)-(D)-(2) separate penalties	Requirement for a written preventive maintenance program for home dialysis equipment.
§97.405(w)(1)-(6) separate penalties	Reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(1)-(4) separate penalties	Provision of laboratory services.
§97.405(y)(1)-(2) separate penalties	Supplies for home dialysis services.
§97.405(z)(1)-(7)(A)-(C) separate penalties	Compliance with policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies, required of an agency that provides home dialysis services.
§97.406(2)-(5) separate penalties	Provision of psychoactive services.
§97.407(1)-(11) separate penalties	Provision of intravenous therapy services.
§97.523(e)	Requirement to grant the surveyor access to the agency.
§97.701(a)-(g) separate penalties	Home health aides.
§95.128(a)-(n) and (q)-(r)	Home health medication aides.
§95.128(o)-(p)	Home health medication aide training program.

Figure: 40 TAC §748.133

Change:	Deadline for notifying us:
(1) The legal structure of your operation	At least seven working days before making the change
(2) The composition of the governing body	Within two days of such a change
(3) The information about governing body officers, executive committee, or members, such as name or location changes	Within 15 days of learning about a change

Figure: 40 TAC §748.303(a)

Serious Incident	(i)To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?	(i) To Law enforcement? (ii) If so, when?
(1) A child dies while in your care.	(A)(i) YES (A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(B)(i) YES (B)(ii) Immediately.	(C)(i) YES (C)(ii) Immediately.
(2) A critical injury or illness that warrants treatment by a medical professional or hospitalization, including dislocated, fractured, or broken bones; concussions; lacerations requiring stitches; second and third degree burns; and damage to internal organs.	(A)(i) YES (A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(B)(i) YES (B)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(C)(i) NO (C)(ii) Not Applicable.
(3) Allegations of abuse, neglect, or exploitation of a child; or any incident where there are indications that a child in care may have been abused, neglected, or exploited.	(A)(i) YES (A)(ii) As soon as you become aware of it.	(B)(i) YES (B)(ii) As soon as you become aware of it.	(C)(i) NO (C)(ii) Not applicable.
(4) Physical abuse committed by a child against another child. For the purpose of this subsection, physical abuse is: physical injury that results in substantial bodily harm and requiring emergency medical treatment, excluding any accident; or failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial bodily harm to a child.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(C)(i) NO (C)(ii) Not applicable.

(5) Sexual abuse committed by a child against another child. For the purpose of this subsection, sexual abuse is: conduct harmful to a child's mental, emotional or physical welfare, including nonconsensual sexual activity between children of any age, and consensual sexual activity between children with more than 24 months difference in age or when there is a significant difference in the developmental level of the children; or failure to make a reasonable effort to prevent sexual conduct harmful to a child.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(C)(i) NO (C)(ii) Not applicable.
(6) A child is indicted, charged, or arrested for a crime.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of it.	(B)(i) YES (B)(ii) As soon as you become aware of it.	(C)(i) NO (C)(ii) Not applicable.
(7) A child developmentally or chronologically under 6 years old is absent from your operation and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) Within 2 hours of notifying law enforcement.	(B)(i) YES (B)(ii) Within 2 hours of notifying law enforcement.	(C)(i) YES (C)(ii) Immediately upon determining the child is not on the premises and the child is still missing.
(8) A child developmentally or chronologically 6 to 12 years old is absent from your operation and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) Within 2 hours of notifying law enforcement, if the child is still missing.	(B)(i) YES (B)(ii) Within 2 hours of determining the child is not on the premises, if the child is still missing.	(C)(i) YES (C)(ii) Within 2 hours of determining the child is not on the premises, if the child is still missing.
(9) A child 13 years old or older is absent from your operation and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.	(B)(i) YES (B)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.	(C)(i) YES (C)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.

(10) A child in your care contracts a communicable disease that the law requires you to report to the Department of State Health Services (DSHS) as specified in 25 TAC Chapter 97, Subchapter A, (relating to Control of Communicable Diseases).	(A)(i) YES, unless the information is confidential. (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(B)(i) YES, if their child has contracted the communicable disease or has been exposed to it. (B)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(C)(i) NO (C)(ii) Not applicable.
(11) A suicide attempt by a child.	(A)(i) YES (A)(ii) As soon as you become aware of the incident.	(B)(i) YES (B)(ii) As soon as you become aware of the incident.	(C)(i) NO (C)(ii) Not applicable.

Figure: 40 TAC §748.303(c)

Serious Incident	(i) To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?
(1) Any incident that renders all or part of your operation unsafe or unsanitary for a child, such as a fire or a flood.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the incident.
(2) A disaster or emergency that requires your operation to close.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the incident.
(3) An adult who has contact with a child in care contracts a communicable disease noted in 25 TAC 97, Subchapter A, (relating to Control of Communicable Diseases).	(A)(i) YES, unless the information is confidential. (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(B)(i) YES, if their child has contracted the communicable disease or has been exposed to it. (B)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.
(4) An allegation that a person under the auspices of your operation who directly cares for or has access to a child in the operation has abused drugs within the past seven days.	(A)(i) YES (A)(ii) Within 24 hours after learning of the allegation.	(B)(i) NO (B)(ii) Not applicable.
(5) An investigation of abuse or neglect by an entity (other than Licensing) of an employee, professional level service provider, volunteer, or other adult at the operation.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the investigation.	(B)(i) NO (B)(ii) Not applicable.
(6) An arrest, indictment, or a county or district attorney accepts an "Information" regarding an official complaint against an employee, professional level service provider, or volunteer alleging commission of any crime as provided in §745.651 of this title (relating to What types of criminal convictions may preclude a person from being present in an operation?).	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the situation.	(B)(i) NO (B)(ii) Not applicable.

Figure: 40 TAC §748.307

Occurrences	(i) To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?
(1) Medically pertinent incidents, such as seizures, that do not rise to the level of a serious incident.	(A)(i) NO (A)(ii) Not applicable; however, you must document the type of incident including the date, time, action taken, and child's name.	(B)(i) YES (B)(ii) Within seven days.
(2) Adding a swimming pool or other permanent body of water.	(A)(i) YES, in writing. (A)(ii) Within 15 days before construction begins.	(B)(i) NO (B)(ii) Not applicable.
(3) Changing your child-care administrator.	(A)(i) YES, in writing. (A)(ii) Within seven days after the action is taken.	(B)(i) NO (B)(ii) Not applicable.

Figure: 40 TAC §748.313

Serious incident	Documentation
(1) Child death, suicide attempt, or a critical injury reportable under §748.303(a)(1), (2), and (11) of this title (relating to When must I report and document a serious incident?).	Any emergency behavior interventions implemented on the child within 48 hours prior to the serious incident.
(2) Any critical injury reportable under §748.303(a)(2) of this title that resulted from a short personal restraint.	Documentation of the short personal restraint, including the precipitating circumstances and specific behaviors that led to the emergency behavior intervention.
(3) Child absent without permission.	(A) Any efforts made to locate the child; (B) The date and time you notified the parent(s) and the appropriate law enforcement agency and the names of the persons with whom you spoke regarding the child's absence and subsequent location or return to the operation; and (C) If the parent cannot be located, dates and times of all efforts made to notify the parent regarding the child's absence and subsequent location or return to the operation.
(4) Any abusive behavior among children reportable under §748.303(a)(4) or (5) of this title.	The difference in size, age, and developmental level of the children involved in the abusive behavior.

Figure: 40 TAC §748.563(a)

Educational qualifications:	Professional qualifications:
(A) A master's degree or higher from an accredited college or university in social work or other human services field and nine credit hours in graduate level courses that focus on family and individual function and interaction; or (B) A nurse's degree or higher if providing treatment services to children with primary medical needs.	One year of documented full-time work experience in a treatment setting serving children, including RTCs, child-placing agencies providing treatment services, Intermediate Care Facilities for children with mental retardation (ICFMR), etc.

Figure: 40 TAC §748.563(b)

Options:	Educational qualifications:	Professional qualifications:
Option 1	(A) A master's degree or higher from an accredited college or university in social work or other human services field; and (B) Nine credit hours in graduate level courses that focus on family and individual function and interaction.	One year of documented full-time work experience in a residential child-care operation, or related field of child and family services.
Option 2	A master's degree or higher from an accredited college or university.	Two years of documented full-time work experience in a residential child-care operation, or related field of child and family services.
Option 3	A bachelor's degree from an accredited college or university in social work or other human services field.	Two years of documented full-time work experience in a residential child-care operation, or related field of child and family services.
Option 4	A bachelor's degree from an accredited college or university.	Three years of documented full-time work experience in a residential child-care operation, or related field of child and family services.

Figure: 40 TAC §748.563(c)

Options:	Educational Qualifications:	Professional Qualifications:
Option 1	A bachelor's degree from an accredited college or university.	No qualifications are needed if the professional level service provider is directly supervised by a service provider who meets one of the qualifications in subsection (a) or (b) of this section.
Option 2	Educational requirements for a Licensed Child-Care Administrator.	Child-Care Administrator's License.

Figure: 40 TAC §748.863(a)

Who is required to receive the training?	What type of pre-service training?	How many hours of training are needed?	When must the training be completed?
(1) All caregivers	General pre-service training	8 hours	Before the person can be the only caregiver responsible for a child in care
(2) All caregivers	Pre-service training regarding emergency behavior intervention	16 hours, however, if your operation prohibits the use of emergency behavior intervention, then only 8 hours of training are needed	Before the person can be the only caregiver responsible for a child in care
(3) Child care administrators, professional level service providers, treatment directors, and case managers	Pre-service training regarding emergency behavior intervention	8 hours	Before beginning job duties

Figure: 40 TAC §748.931

Who is required to receive the annual training?	How many hours of annual training are needed?
(1) Caregivers where an operation has less than 25 children in care that are receiving treatment services and less than 30% of their total population of children in care are receiving treatment services	(A) 20 hours. (B) Of the 20 hours, every six months a caregiver must complete at least four hours of training specifically related to the emergency behavior intervention techniques that you allow. The caregiver must have this training within 180 days from the date that he last received such training.
(2) Caregivers where an operation has 25 or more children in care that are receiving treatment services or 30% or more of their total population of children in care are receiving treatment services	(A) 50 hours. (B) Of the 50 hours, every six months a caregiver must complete at least four hours of training specifically related to the emergency behavior intervention techniques that you allow. The caregiver must have this training within 180 days from the date that he last received such training.
(3) Child-care administrators, professional level service providers, treatment directors, and case managers who hold a relevant professional license	15 hours, however, annual training hours used to maintain a person's relevant professional license may be used to complete these hours.
(4) Child-care administrators, professional level service providers, treatment directors, and case managers who do not hold a relevant professional license	20 hours

Figure: 40 TAC §748.1219

If:	Then:
(1) You intend to provide treatment services for a child with an emotional disorder or pervasive development disorder	(A) The admission assessment must include a written, dated, and signed psychiatric or psychological diagnostic assessment including the child's diagnoses. (i) If the child is coming from another regulated placement, the evaluation must have been completed within 14 months of the date of admission. (ii) If the child is not coming from another regulated placement, the evaluation must have been completed within six months of the date of admission. (B) The admission assessment must include the reason(s) for choosing treatment services for the child. (C) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.
(2) You intend to provide treatment services for a child with mental retardation	(A) The admission assessment must include a psychological evaluation with a psychometric evaluation completed within 14 months of the date of admission. (i) A licensed psychologist who has experience with mental retardation or published scales must determine and document the child's level of adaptive functioning. (ii) Standardized tests must be used to determine the intellectual functioning of a child. The test results must be documented in the evaluation. (iii) The evaluation must indicate manifestations of mental retardation as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. (B) The admission assessment must include the reason(s) for choosing treatment services for the child. (C) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.

(3) You intend to provide treatment services for a child with primary medical needs	(A) The admission assessment must have a licensed physician's signed, written orders as the basis for the child's admission. The physician's evaluation must confirm that the child can be cared for appropriately in a residential child-care operation and that the child's caregivers have been trained to meet the needs of the child and demonstrated competency. (B) The written orders must include orders for: (i) Medications; (ii) Treatments; (iii) Diet; (iv) Range-of-motion program at stated intervals; (v) Habilitation, as appropriate; and (vi) Any special medical or developmental procedures. (C) The admission assessment must include the reason(s) for choosing treatment services for the child. (D) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.
(4) The child's behavior and/or history within the last two months indicates that the child is an immediate danger to himself or others	(A) The admission assessment must include a written, dated, and signed psychiatric or psychological diagnostic assessment including: (i) The child's diagnosis, if applicable; (ii) An assessment of the child's needs and potential danger to himself or others; and (iii) Recommendations for care, treatment, and further evaluation. If the child is admitted, the recommendations must become part of the child's plan of service and must be implemented. (B) If the child is: (i) Coming from another regulated placement, the evaluation must have been completed within 14 months of the date of admission. (ii) Not coming from another regulated placement, the evaluation must have been completed within six months of the date of admission. (C) You must then evaluate your ability to provide services and safeguards appropriate to the child's needs, including direct and continuous supervision, if needed.

Figure: 40 TAC §748.1337(b)

Type of Service	Items that must be included:
(1) Child-care services	(A) The child's needs identified in the admission assessment, in addition to basic needs related to day-to-day care and development, including: (i) Medical needs, including scheduled medical exams and plans for recommended follow-up treatment; (ii) Dental needs, including scheduled dental exams and plans for recommended follow-up treatment; (iii) Intellectual functioning, including any testing and plans for recommended follow-up; (iv) Developmental functioning, including any developmental delays and plans to improve or remediate developmental functioning; (v) Educational needs and how those needs will be met, including planning for high school completion and post-secondary education and training, if appropriate, and any school evaluations or recommendations; (vi) Plans for social, recreation, and leisure activities; (vii) Plans for integrating the child into the community and community activities, as appropriate; (viii) Therapeutic needs, including plans for psychological/psychiatric testing and follow-up treatment and use of psychotropic medications; and (ix) Cultural identity needs, including assisting children in connecting with their culture in the community; (B) Plans for maintaining and improving the child's relationship with family members, including recommendations for visitation and contacts between the child and the child's parents, the child and the child's siblings, and the child and the child's extended family; (C) Recent data from the current caregiver's evaluation of the child's behavior and level of functioning; (D) Specific goals and strategies to meet the child's needs, including instructions to caregivers responsible for the care of the child. Instructions must include specific information about: (i) Level of supervision required; (ii) Discipline techniques; (iii) Behavior intervention techniques; (iv) Plans for trips and visits away from the operation; and (v) Any actions the caregivers must take or conditions the caregivers must be aware of to meet the child's special needs, such as medications, medical care, dietary needs, psychiatric care, how to communicate with the child, and reward systems; (E) If the child is 13 years old or older, a plan for educating the child in the following areas: (i) Healthy interpersonal relationships; (ii) Healthy boundaries; (iii) Pro-social communication skills; (iv) Sexually transmitted diseases; and (v) Human reproduction;

	(F) For children 16 years old and older, preparation for independent living; (G) For children who exhibit high risk behaviors, such as self harm, sexual aggression, runaway, or substance abuse: (i) Plans to minimize the risk of harm to the child or others, such as special instructions for caregivers, sleeping arrangements, or bathroom arrangements; and (ii) A specific safety contract developed between the child and employee that addresses how the child's safety needs will be maintained; (H) Expected outcomes of placement for the child and estimated length of stay in care; (I) Plans for discharge; (J) The names and roles of persons who participated in the development of the child's service plan; (K) The date the service plan was developed and completed; (L) The effective date of the service plan; and (M) The signatures of the service planning team members that were involved in the development of the service plan.
(2) Treatment services	(A) The child-care services planning requirements noted above; (B) A description of the emotional, behavioral, and physical conditions that require treatment services; (C) A description of the emotional, behavioral, and physical conditions the child must achieve and maintain to function in a less restrictive setting, including any special treatment program and/or other services and activities that are planned to help the child achieve and to function in a less restrictive setting; and (D) A list of emotional, physical, and social needs that require specific professional expertise, and plans to obtain the appropriate professional consultation and treatment for those needs. Any specialized testing, recommendations, and/or treatment must be documented in the child's record.
(3) Treatment services for children with mental retardation	(A) The child-care treatment services planning requirements noted above; (B) A minimum of one hour per day of visual, auditory and tactile stimulation to enhance the child's physical, neurological, and emotional development; (C) An educational or training plan encouraging normalization appropriate to the child's functioning; and (D) Career planning for older adolescents who are not receiving treatment services for severe or profound mental retardation.
(4) Transitional living program	(A) Child-care service planning requirements; (B) Plans for encouraging the child to participate in community life and to form interpersonal relationships/friendships outside the transitional living program, such as community team sports, Eagle Scouts, and employment after school; (C) Consumer education, such as meal planning, meal preparation, grocery shopping, public transportation, searching for an apartment, and obtaining utility services;

	(D) Career planning, including assisting the child in enrolling in an educational or vocational job training program; (E) Money management and assisting the child in establishing a personal bank account; (F) Assisting the child with how to access resources, such as medical and dental care, therapy, mental health care, an attorney, the police, and other emergency assistance; (G) Assisting the child in obtaining the child's social security number, birth certificate, and a driver's license or a Department of Public Safety identification card, as needed; and (H) Problem-solving, such as assessing personal strengths and needs, stress management, reviewing options, assessing consequences for actions taken and possible short-term and long-term results, and establishing goals and planning for the future.

Figure: 40 TAC §748.1381

Type of Service	Review and Update
(1) Child-care services	At least 180 days from the date of the child's last service plan.
(2) Treatment services for emotional disorder, pervasive developmental disorder, or primary medical needs	At least 90 days from the date of the child's last service plan.
(3) Treatment services for mental retardation	In the first year of care, the plan must be reviewed at least every 180 days from the date of the child's last service plan. Thereafter, the plan must be reviewed at least annually from the date of the child's last service plan review.

Figure: 40 TAC §748.2501

Type of Emergency Behavior Intervention	(A) Are written orders required to administer the intervention for a specific child?	(B) Who can write orders for the use of the intervention for a specific child?
(1) Short personal restraint	(A) NO.	(B) Not applicable.
(2) Personal restraint	(A) NO. However, successive restraints, a restraint simultaneous with emergency medication, and/or a restraint that exceeds the maximum time limit all require orders as specified in this subchapter. PRN orders are also permitted under §748.2507 of this title (relating to Under what conditions are PRN orders permitted for a specific child?).	(B) Not Applicable.
(3) Emergency medication	(A) YES.	(B) A licensed physician.
(4) Seclusion	(A) YES, except written orders are not required when you provide emergency care services to the child placed in seclusion.	(B) A licensed psychiatrist, psychologist, or physician.
(5) Mechanical restraint	(A) YES.	(B) A licensed psychiatrist.

Figure: 40 TAC §748.2507

Type of Emergency Behavior Intervention	Conditions:
(1) Short personal restraint	Not applicable, because short personal restraints do not require orders.
(2) Personal restraint	Note: Continuation orders are required for extending the maximum amount of time for a personal restraint; and an order or recommendation from the service planning team is needed to forestall some triggered reviews. (A) Orders must include the number of times a child may be restrained in a seven-day period. (B) If the orders allow more than three restraints within a seven-day period, the order must include a plan for reducing the need for emergency behavior intervention. (C) The licensed psychiatrist or psychologist must review PRN orders for personal restraint at least every 30 days. The review must include written clinical justification for the continuation of PRN orders and be documented in the child's record. (D) PRN orders may not be used to restrain a child beyond the maximum length of time for personal restraint. See §748.2801 of this title (relating to What is the maximum length of time that an emergency behavior intervention can be administered to a child?).
(3) Emergency medication	The licensed physician must review PRN orders for emergency medication at least every 30 days. The review must include written clinical justification for the continuation of PRN orders and be documented in the child's record.
(4) Seclusion	(A) A licensed psychiatrist ordering seclusion is permitted to use PRN orders; however, a licensed psychologist is not. (B) PRN orders may not be used to seclude a child beyond the maximum length of time for seclusion. See §748.2801 of this title. (C) The psychiatrist must review PRN orders for seclusion at least every 30 days. The review must include written clinical justification for the continuation of PRN orders and be documented in the child's record.
(5) Mechanical restraint	PRN orders are not permitted.

Figure: 40 TAC §748.3701(e)

Types of service	The caregivers must:
(1) Child-care services	(A) Ensure that opportunities to participate in community activities, such as school sports or other extracurricular school activities, religious activities, or local social events, are available to the child; and (B) Organize community activities, religious activities, or local social events that are available to the child.
(2) Treatment services	(A) Meet the requirements in paragraph (1)(A) of this chart; (B) Ensure that each child receiving treatment services has an individualized recreation plan designed by the service planning team or professionals who are qualified to address the child's individual needs, that the plan is implemented, and that the plan is revised by the service planning team or qualified professionals, as needed; and (C) Ensure that medical and physical support are given if the recreational and leisure-time activities require it for a child who is receiving treatment services for primary medical needs, pervasive developmental disorder, or mental retardation.

Figure: 40 TAC §748.3757(a)

If the age of the youngest child is...	Then you must have one adult to supervise every (number) child/ren in the group	Swimming Child/Adult Ratio
0 to 23 months old	1	1:1
2 years old	2	2:1
3 years old	3	3:1
4 years old	4	4:1
5 years old or older	You must meet the applicable child/caregiver ratios as provided in §748.1003 of this title (relating to For purposes of the child/caregiver ratio, how many children can a single caregiver care for during the children's waking hours?).	

Figure: 40 TAC §749.133

Change:	Deadline for notifying us:
(1) The legal structure of your agency	At least seven working days before making the change
(2) The composition of the governing body	Within 2 days of such a change
(3) The information about governing body officers, executive committee, or members, such as name or location changes	Within 15 days of learning about a change

Figure: 40 TAC §749.503(a)

Serious Incident	(i)To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?	(i) To Law enforcement? (ii) If so, when?
(1) A child dies while in your care.	(A)(i) YES (A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(B)(i) YES (B)(ii) Immediately	(C)(i) YES (C)(ii) Immediately
(2) A critical injury or illness that warrants treatment by a medical professional or hospitalization, including dislocated, fractured, or broken bones; concussions; lacerations requiring stitches; second and third degree burns; and damage to internal organs.	(A)(i) YES (A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(B)(i) YES (B)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence.	(C)(i) NO (C)(ii) Not Applicable
(3) Allegations of abuse, neglect, or exploitation of a child; or any incident where there are indications that a child in care may have been abused, neglected, or exploited.	(A)(i) YES (A)(ii) As soon as you become aware of it.	(B)(i) YES (B)(ii) As soon as you become aware of it.	(C)(i) NO (C)(ii) Not applicable
(4) Physical abuse committed by a child against another child. For the purpose of this subsection, physical abuse is: physical injury that results in substantial bodily harm and requiring emergency medical treatment, excluding any accident; or failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial bodily harm to the child.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(C)(i) NO (C)(ii) Not applicable

(5) Sexual abuse committed by a child against another child. For the purpose of this subsection, sexual abuse is: conduct harmful to a child's mental, emotional or physical welfare, including nonconsensual sexual activity between children of any age, and consensual sexual activity between children with more than 24 months difference in age or when there is a significant difference in the developmental level of the children; or failure to make a reasonable effort to prevent sexual conduct harmful to a child.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the occurrence or incident.	(C)(i) NO (C)(ii) Not applicable
(6) A child is indicted, charged, or arrested for a crime.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of it.	(B)(i) YES (B)(ii) As soon as you become aware of it.	(C)(i) NO (C)(ii) Not applicable
(7) A child developmentally or chronologically under 6 years old is absent from a foster home and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) Within 2 hours of notifying law enforcement.	(B)(i) YES (B)(ii) Within 2 hours of notifying law enforcement.	(C)(i) YES (C)(ii) Immediately upon determining the child is not on the premises and the child is still missing.
(8) A child developmentally or chronologically 6 to 12 years old is absent from a foster home and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) Within 2 hours of notifying law enforcement, if the child is still missing.	(B)(i) YES (B)(ii) Within 2 hours of determining the child is not on the premises, if the child is still missing.	(C)(i) YES (C)(ii) Within 2 hours of determining the child is not on the premises, if the child is still missing.

(9) A child 13 years old or older is absent from a foster home and cannot be located, including the removal of a child by an unauthorized person.	(A)(i) YES (A)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.	(B)(i) YES (B)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.	(C)(i) YES (C)(ii) No later than 24 hours from when the child's absence is discovered and the child is still missing.
(10) A child in your care contracts a communicable disease that the law requires you to report to the Department of State Health Services (DSHS) as specified in 25 TAC Chapter 97, Subchapter A, (relating to Control of Communicable Diseases).	(A)(i) YES, unless the information is confidential. (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(B)(i) YES, if their child has contracted the communicable disease or has been exposed to it. (B)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(C)(i) NO (C)(ii) Not applicable
(11) A suicide attempt by a child.	(A)(i) YES (A)(ii) As soon as you become aware of the incident.	(B)(i) YES (B)(ii) As soon as you become aware of the incident.	C)(i) NO (C)(ii) Not applicable

Figure: 40 TAC §749.503(c)

Serious Incident	(i) To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?
(1) Any incident that renders all or part of your agency or a foster home unsafe or unsanitary for a child, such as a fire or a flood.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the incident.
(2) A disaster or emergency that requires a foster home to close.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after the incident.	(B)(i) YES (B)(ii) As soon as possible, but no later than 24 hours after the incident.
(3) An adult who has contact with a child in care contracts a communicable disease noted in 25 TAC Chapter 97, Subchapter A, (relating to Control of Communicable Diseases).	(A)(i) YES, unless the information is confidential. (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.	(B)(i) YES, if their child has contracted the communicable disease or has been exposed to it. (B)(ii) As soon as possible, but no later than 24 hours after you become aware of the communicable disease.
(4) An allegation that a person under the auspices of your child-placing agency who directly cares for or has access to a child in the setting has abused drugs within the past seven days.	(A)(i) YES (A)(ii) Within 24 hours after learning of the allegation.	(B)(i) NO (B)(ii) Not applicable.
(5) An investigation of abuse or neglect by any other entity other than Licensing of an employee, contract staff, volunteer, or other adult at the agency.	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the investigation.	(B)(i) NO (B)(ii) Not applicable.
(6) An arrest or indictment, or a county or district attorney accepts an "Information" regarding an official complaint, against an employee, a foster parent, a contract staff, or volunteer alleging commission of any crime as provided in §745.651 of this title (relating to What types of criminal convictions may preclude a person from being present in an operation?).	(A)(i) YES (A)(ii) As soon as possible, but no later than 24 hours after you become aware of the situation.	(B)(i) NO (B)(ii) Not applicable.

Figure: 40 TAC §749.507

Occurrences	(i) To Licensing? (ii) If so, when?	(i) To Parents? (ii) If so, when?
(1) Medically pertinent incidents, such as seizures, that do not rise to the level of a serious incident.	(A)(i) NO (A)(ii) Not applicable; however, you must document the type of incident including the date, time, action taken, and child's name.	(B)(i) YES (B)(ii) Within seven days.
(2) The adding of a swimming pool or other permanent body of water to a foster home.	(A)(i) YES, in writing. (A)(ii) Within 15 days before construction begins.	(B)(i) NO (B)(ii) Not applicable.
(3) Changing your child-placing agency administrator.	(A)(i) YES, in writing. (A)(ii) Within seven days after the action is taken.	(B)(i) NO (B)(ii) Not applicable.

Figure: 40 TAC §749.513

Serious incident	Documentation
(1) Child death, suicide attempt, or a critical injury reportable under §749.503(a)(1), (2), and (11) of this title (relating to When must I report and document a serious incident?).	Any emergency behavior intervention implemented on the child within 48 hours prior to the serious incident.
(2) Any critical injury reportable under §749.503(a)(2) of this title that resulted from a short personal restraint.	Documentation of the short personal restraint, including the precipitating circumstances and specific behaviors that led to the emergency behavior intervention.
(3) Child absent without permission.	(A) Any efforts made to locate the child; (B) The date and time you notified the parent(s) and the appropriate law enforcement agency and the names of the persons with whom you spoke regarding the child's absence and subsequent location or return to the foster home; and (C) If the parent cannot be located, dates and times of all efforts made to notify the parent regarding the child's absence and subsequent location or return to the foster home.
(4) Any abusive behavior among children reportable under §749.503(a)(4) or (5) of this title.	The difference in size, age, and developmental level of the children involved in the abusive behavior.

Figure: 40 TAC §749.673

Options for qualifications:	Educational qualifications:	Professional qualifications:
Option 1	(1) (A) A master's degree from an accredited college or university in social work or other human services field; and (B) Nine credit hours in graduate level courses that focus on family and individual function and interaction.	One year of documented full-time work experience in a child-placing agency under the direct supervision of a person fully qualified to conduct child placement management activities. The experience may include a maximum of 350 hours of formal, supervised field placement or practicum in child-placing activities.
Option 2	(2) A master's degree from an accredited college or university.	Two years of documented full-time work experience in a child-placing agency under the direct supervision of a person fully qualified to conduct child placement management activities. The experience may include a maximum of 350 hours of formal, supervised field placement or practicum in child-placing activities.
Option 3	(3) A bachelor's degree from an accredited college or university in social work or other human services field.	Two years of documented full-time work experience in a child-placing agency under the direct supervision of a person fully qualified to conduct child placement management activities. The experience may include a maximum of 350 hours of formal, supervised field placement or practicum in child-placing activities.

Option 4	(4) A bachelor's degree from an accredited college or university.	(A) Three years of documented full-time work experience in a child-placing agency under the direct supervision of a person fully qualified to conduct child placement management activities. The experience may include a maximum of 350 hours of formal, supervised field placement or practicum in child-placing activities; or (B) Direct supervision from a person fully qualified to conduct child-placement management activities. The direct supervision with the child-placement staff must consist of 10 documented, monthly, face-to-face, individual, case-related conferences over each annual period. The direct supervision must continue until the employee's previous experience and directly supervised experience totals three years.

Figure: 40 TAC §749.863(a)

Who is required to receive the training?	What type of pre-service training?	How many hours of training are needed?	When must the training be completed?
(1) All caregivers	General pre-service training	8 hours	Before this person can be the only caregiver responsible for a child in care
(2) Caregivers caring for children receiving only child care services, programmatic services, and or treatment services for primary medical needs	Pre-service training regarding emergency behavior intervention	8 hours	Before this person can be the only caregiver responsible for a child in care
(3) Caregivers caring for children receiving treatment services for emotional disorders, mental retardation, or pervasive developmental disorders	Pre-service training regarding emergency behavior intervention	16 hours, however, if your agency prohibits the use of emergency behavior intervention, then only 8 hours of training are needed	Before this person can be the only caregiver responsible for a child in care
(4) Child-placing agency administrators, treatment directors, child placement staff, child placement management staff, and full-time professional service providers	Pre-service training regarding emergency behavior intervention	8 hours	Before beginning job duties

Figure: 40 TAC §749.931

Who is required to receive the annual training?	How many hours of annual training are needed?
(1) Caregivers caring for children receiving only child-care services, programmatic services, and/or treatment services for primary medical needs	(A) For homes with two foster parents, the foster parents must receive a total of 20 hours of annual training, of which four hours must be on training specific to the emergency behavior interventions allowed by your agency. (B) For all other caregivers, each caregiver must receive 20 hours of annual training, of which four hours must be on training specific to the emergency behavior interventions allowed by your agency.
(2) Caregivers caring for children receiving treatment services for emotional disorders, mental retardation, or pervasive developmental disorders	(A) For homes with two foster parents, the foster parents must receive a total of 50 hours of annual training, of which eight hours for each foster parent must be on training specific to the emergency behavior interventions allowed by your agency. These 50 hours must be distributed appropriately, and each foster parent must receive some amount of training. (B) For homes with one foster parent, 30 hours, of which eight hours must be on training specific to the emergency behavior interventions allowed by your agency. (C) All other caregivers, 30 hours, of which eight hours must be on training specific to the emergency behavior interventions allowed by your agency.
(3) Child placement staff with less than one year of child-placing experience	(A) 30 hours for the initial year; (B) 20 hours after the initial year; and (C) There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.
(4) Child placement staff with at least one year of child-placing experience	20 hours. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.
(5) Child placement management staff	20 hours. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.
(6) Child-placing agency administrators, executive directors, treatment directors, and full-time professional service providers who hold a relevant professional license	(A) 15 hours, however, annual training hours used to maintain a person's relevant professional license may be used to complete these hours. (B) There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.

(7) Child-placing agency administrators, executive directors, treatment directors, and full-time professional service providers who do not hold a relevant professional license	20 hours. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.

Figure: 40 TAC §749.1135

If:	Then:
(1) You intend to provide treatment services for a child with an emotional disorder or pervasive development disorder	(A) The admission assessment must include a written, dated, and signed psychiatric or psychological diagnostic assessment, including the child's diagnoses. (i) If the child is coming from another regulated placement, the evaluation must have been completed within 14 months of the date of admission. (ii) If the child is not coming from another regulated placement, the evaluation must have been completed within six months of the date of admission. (B) The admission assessment must include the reason(s) for choosing treatment services for the child. (C) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.
(2) You intend to provide treatment services for a child with mental retardation	(A) The admission assessment must include a psychological evaluation with a psychometric evaluation completed within 14 months of the date of admission. (i) A licensed psychologist who has experience with mental retardation or published scales must determine and document the child's level of adaptive functioning. (ii) Standardized tests must be used to determine the intellectual functioning of a child. The test results must be documented in the evaluation. (iii) The evaluation must indicate manifestations of mental retardation as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. (B) The admission assessment must include the reason(s) for choosing treatment services for the child. (C) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.

(3) You intend to provide treatment services for a child with primary medical needs	(A) The admission assessment must have a licensed physician's signed, written orders as the basis for the child's admission. The physician's evaluation must confirm that the child can be cared for appropriately in a foster home setting and that the foster parents have been trained to meet the needs of the child and demonstrated competency (B) The written orders must include orders for: (i) Medications; (ii) Treatments; (iii) Diet; (iv) Range-of-motion program at stated intervals; (v) Habilitation, as appropriate; and (vi) Any special medical or developmental procedures. (C) The admission assessment must include the reason(s) for choosing treatment services for the child. (D) The admission assessment must include consideration given to any history of inpatient or outpatient treatment.
(4) The child's behavior and/or history within the last two months indicates that the child is an immediate danger to himself or others	(A) The admission assessment must include a written, dated, and signed psychiatric or psychological diagnostic assessment including: (i) The child's diagnosis, if applicable; (ii) An assessment of the child's needs and potential danger to himself or others; and (iii) Recommendations for care, treatment, and further evaluation. If the child is admitted, the recommendations must become part of the child's service plan and must be implemented. (B) If the child is: (i) Coming from another regulated placement, the evaluation must have been completed within 14 months of the date of admission. (ii) Not coming from another regulated placement, the evaluation must have been completed within six months of the date of admission. (C) You must then evaluate your ability to provide services and safeguards appropriate to the child's needs, including direct and continuous supervision, if needed.

Figure: 40 TAC §749.1309(b)

Type of Service	Items that must be included:
(1) Child-care services	(A) The child's needs identified in the admission assessment, in addition to basic needs related to day-to-day care and development, including: (i) Medical needs, including scheduled medical exams and plans for recommended follow-up treatment; (ii) Dental needs, including scheduled dental exams and plans for recommended follow-up treatment; (iii) Intellectual functioning, including any testing and plans for recommended follow-up; (iv) Developmental functioning, including any developmental delays and plans to improve or remediate developmental functioning; (v) Educational needs and how those needs will be met, including planning for high school completion and post-secondary education and training, if appropriate, and any school evaluations or recommendations; (vi) Plans for social, recreation, and leisure activities; (vii) Plans for integrating the child into the community and community activities, as appropriate; (viii) Therapeutic needs, including plans for psychological/psychiatric testing and follow-up treatment and use of psychotropic medications; and (ix) Cultural identity needs, including assisting children in connecting with their culture in the community; (B) Plans for maintaining and improving the child's relationship with family members, including recommendations for visitation and contacts between the child and the child's parents, the child and the child's siblings, and the child and the child's extended family; (C) Recent data from the current caregiver's evaluation of the child's behavior and level of functioning; (D) Specific goals and strategies to meet the child's needs, including instructions to caregivers responsible for the care of the child. Instructions must include specific information about: (i) Level of supervision required; (ii) Discipline techniques; (iii) Behavior intervention techniques; (iv) Plans for trips and visits away from the agency; and (v) Any actions the caregivers must take or conditions the caregivers must be aware of to meet the child's special needs, such as medications, medical care, dietary needs, psychiatric care, how to communicate with the child, and reward systems; (E) If the child is 13 years old or older, a plan for educating the child in the following areas: (i) Healthy interpersonal relationships; (ii) Healthy boundaries; (iii) Pro-social communication skills; (iv) Sexually transmitted diseases; and (v) Human reproduction;

	(F) For children 16 years old and older, preparation for independent living; (G) For children who exhibit high risk behaviors, such as self harm, sexual aggression, runaway, or substance abuse: (i) Plans to minimize the risk of harm to the child or others, such as special instructions for caregivers, sleeping arrangements, or bathroom arrangements; and (ii) A specific safety contract developed between the child and staff that addresses how the child's safety needs will be maintained; (H) Expected outcomes of placement for the child and estimated length of stay in care; (I) Plans for discharge; (J) The names and roles of persons who participated in the development of the child's service plan; (K) The date the service plan was developed and completed; (L) The effective date of the service plan; and (M) The signatures of the service planning team members that were involved in the development of the service plan.
(2) Treatment services	For children receiving treatment services, the plan must address all of the child's waking hours and include: (A) The child-care services planning requirements noted above; (B) A description of the emotional, behavioral, and physical conditions that require treatment services; (C) A description of the emotional, behavioral, and physical conditions the child must achieve and maintain to function in a less restrictive setting, including any special treatment program and/or other services and activities that are planned to help the child achieve and to function in a less restrictive setting; and (D) A list of emotional, physical, and social needs that require specific professional expertise, and plans to obtain the appropriate professional consultation and treatment for those needs. Any specialized testing, recommendations, and/or treatment must be documented in the child's record.
(3) Treatment services for children with mental retardation	(A) The child-care and treatment services planning requirements noted above; (B) A minimum of one hour per day of visual, auditory and tactile stimulation to enhance the child's physical, neurological, and emotional development; (C) An educational or training plan encouraging normalization appropriate to the child's functioning; and (D) Career planning for older adolescents who are not receiving treatment services for severe or profound mental retardation.

(4) Transitional living program	(A) Child-care service planning requirements; (B) Plans for encouraging the child to participate in community life and to form interpersonal relationships/friendships outside the transitional living program, such as community team sports, Eagle Scouts, and employment after school; (C) Consumer education, such as meal planning, meal preparation, grocery shopping, public transportation, searching for an apartment, and obtaining utility services; (D) Career planning, including assisting the child in enrolling in an educational or vocational job training program; (E) Money management and assisting the child in establishing a personal bank account; (F) Assisting the child with how to access resources, such as medical and dental care, therapy, mental health care, an attorney, the police, and other emergency assistance; (G) Assisting the child in obtaining the child's social security number, birth certificate, and a driver's license or a Department of Public Safety identification card, as needed; and (H) Problem-solving, such as assessing personal strengths and needs, stress management, reviewing options, assessing consequences for actions taken and possible short-term and long-term results, and establishing goals and planning for the future.

Figure: 40 TAC §749.1331

Type of Service	Review and Update
(1) Child-care services	At least 180 days from the date of the child's last service plan.
(2) Treatment services for emotional disorder, pervasive developmental disorder, or primary medical needs	At least 90 days from the date of the child's last service plan.
(3) Treatment services for mental retardation	In the first year of care, the plan must be reviewed at least every 180 days from the date of the child's last service plan. Thereafter, the plan must be reviewed at least annually from the date of the child's last service plan review.

Figure: 40 TAC §749.1921(d)

Types of service	The caregivers must:
(1) Child-care services	(A) Ensure that opportunities to participate in community activities, such as school sports or other extracurricular school activities, religious activities, or local social events, are available to the child; and (B) Organize family activities, religious activities, or local social events that are available to the child.
(2) Treatment services	(A) Meet the requirements in paragraph (1)(A) of this chart; (B) Ensure that each child receiving treatment services has an individualized recreation plan designed by the service planning team or professionals who are qualified to address the child's individual needs, that the plan is implemented, and that the plan is revised by the service planning team or qualified professionals, as needed; and (C) Ensure that medical and physical support are given if the recreational and leisure-time activities require it for a child who is receiving treatment services for primary medical needs, pervasive developmental disorder, or mental retardation.

Figure: 40 TAC §749.2101

Type of Emergency Behavior Intervention	(A) Are written orders required to administer the intervention for a specific child?	(B) Who can write orders for the use of the intervention for a specific child?
(1) Short personal restraint	(A) NO.	(B) Not applicable.
(2) Personal restraint	(A) NO. However, successive restraints, a restraint simultaneous with emergency medication, and/or a restraint that exceeds the maximum time limit all require orders as specified in this subchapter. PRN orders are also permitted under §749.2107 of this title (relating to Under what conditions are PRN orders permitted for a specific child?).	(B) Not Applicable.
(3) Emergency medication	(A) YES.	(B) A licensed physician.

Figure: 40 TAC §749.2107

Type of Emergency Behavior Intervention	Conditions:
(1) Short personal restraint	Not applicable, because short personal restraints do not require orders.
(2) Personal restraint	(A) Orders must include the number of times a child may be restrained in a seven-day period. (B) If the orders allow more than three restraints within a seven-day period, the order must include a plan for reducing the need for emergency behavior intervention. (C) The licensed psychiatrist or psychologist must review PRN orders for personal restraint at least every 30 days. The review must include written clinical justification for the continuation of PRN orders and be documented in the child's record. (D) PRN orders may not be used to restrain a child beyond the maximum length of time for personal restraint. See §749.2281 of this title (relating to What is the maximum length of time that an emergency behavior intervention can be administered to a child?).
(3) Emergency medication	The licensed physician must review PRN orders for emergency medication at least every 30 days. The review must include written clinical justification for the continuation of PRN orders and be documented in the child's record.

Figure: 40 TAC §749.2447

Required Information	Description of Discussion, Assessment and Documentation Requirements
(1) The age of the prospective foster parents. Ages of all other members of the household.	All prospective foster parents must be at least 21 years old. You must document the ages of all household members and include documentation verifying the ages of the foster parents.
(2) The educational level of the prospective foster parents.	You must ensure and document that each foster parent is able to comprehend and benefit from training and provide appropriate care and supervision to meet the needs of children in care, in areas such as health, education, and discipline/behavior management, by doing either or both of the following: (A) Require that foster parents have a high school diploma or a G.E.D. high school equivalency. TEA or other public education entity outside of Texas must recognize the high school program or high school equivalent program; or (B) Have a screening program that: (i) Ensures that each foster parent is able to be an appropriate role model for children in placement; (ii) Ensures that each foster parent is able to communicate with the child in the child's own language, or has other means to communicate with the child in the child's own language; and (iii) Addresses adequately basic competencies that would otherwise be met by a high school diploma or G.E.D. including basic reading, writing, and math.
(3) Personal characteristics.	You must document information from foster parents that demonstrate: (A) Emotional stability, good character, good health, and adult responsibility; and (B) The ability to provide nurturing care, appropriate supervision, reasonable discipline, and a home-like atmosphere for children.
(4) History of marital relationships including any previous marriages.	You must document information about any previous marriages, divorces, or deaths of former spouses. Foster parents and caregivers must demonstrate the ability to form and sustain adult relationships.
(5) A history of the prospective foster parents' residence and their citizenship status.	You must document the: (A) Length of time spent at each residence for the past 10 years (street address, city, state); and (B) Citizenship of the prospective foster parents.
(6) The financial status of the prospective foster family.	Information on the family's income must be verified and documented.

(7) The results of the criminal history and central registry background checks conducted on the prospective foster parents and any non-client person 14 years of age or older who regularly or frequently stays or is present in the home.	Persons applying to foster children and any person, excluding clients, 14 years of age or older who will regularly or frequently be staying or present at the home, must obtain a criminal history and central registry background check. See Chapter 745, Subchapter F of this title (relating to Background Checks). The results of those checks must be documented in the foster home record and the home study.
(8) The prospective foster parents' motivation to provide foster care.	Assess and document the prospective foster parents' motivation to provide foster care.
(9) Health status of all persons living in the home.	Document information about the physical and mental health status (including substance abuse history) of all persons living in the home in relation to the family's ability to provide foster care. You must observe these persons for any indication of problems and follow up, where indicated, with a professional evaluation. Document the information obtained through your observations.
(10) The quality of marital and family relationships.	Describe, address, and document the quality of marital and family relationships in relation to the family's ability to provide foster care. You must discuss and assess the stability of a couple's relationship, the strengths and problems of the relationship, and how those issues will relate to foster children placed in the home. You must discuss and assess the quality of the relationships between prospective foster parents and their biological children, living in or out of the home, strengths and problems of those relationships, and how those issues will relate to foster children placed in the home.
(11) The prospective foster parents' feelings about their childhoods and parents.	Discuss, assess, and document the prospective foster parents' feelings about their childhoods and parents, including any history of abuse or neglect and their resolution of those experiences.
(12) The prospective foster parents' attitudes about a foster child's or his biological family's religion.	Evaluate and document prospective foster parents on: (A) Their willingness to respect and encourage a child's religious affiliation, if any; (B) Their willingness to provide a child opportunity for religious and spiritual development, if desired; and (C) The health protection they plan to give a child if the foster parents religious beliefs prohibit certain medical treatment.

(13) The prospective foster parents' values, feelings, and practices in regard to child care and discipline.	Discuss, assess, and document the applicants' knowledge of child development and their child-care experience. Discuss and assess the ways the applicants were disciplined as children and their reactions to the discipline they received. Discuss and assess the prospective foster parents' discipline styles, techniques, and their ability to recognize and respect differences in children and use discipline methods that suit the individual child. If their current discipline methods are different than those that you approve, discuss and assess how they would change their child-care practices to conform to your approved methods.
(14) The prospective foster parents' sensitivity to and feelings about children who may have been subjected to abuse or neglect.	Discuss, assess, and document the prospective foster parents' understanding of the dynamics of child abuse and neglect. Discuss and assess their understanding of how these issues and experiences will affect them, their families, and foster children in their care. Discuss and assess the prospective foster parent's ability to help children who have been abused or neglected. If the prospective foster parent experienced abuse or neglect as a child, assess his handling of those experiences and the impact of those experiences on the applicant's ability to help children deal with their own experiences. Assess the availability of family and community resources to meet the needs of the children in the family's care.
(15) The prospective foster parents' sensitivity to and feelings about children's experiences of separation from or loss of their biological families.	Discuss, assess, and document the prospective foster parents' understanding of the dynamics of separation and loss and the effects of these experiences on children. Discuss and assess their personal experiences with separation and loss and their processing of those experiences. Assess the potential foster parents' acceptance of the process of grief and loss for children and assess their ability to help a child through the grieving process.
(16) The prospective foster parents' sensitivity to, and feelings about, a child's biological family.	Discuss, assess, and document the prospective foster parents' feelings about the child's parents, including those parents who abused or neglected the child. Discuss and assess their sensitivity and reactions to the biological parents. Discuss and assess their sensitivity to and acceptance of a child's feelings about his parents and assess their ability to help the child deal with those feelings. Discuss and assess the potential foster parents' sensitivity to and acceptance of the child's relationships with his siblings. Discuss and assess their willingness to support the child's relationships with parents, siblings, and extended family including their support for contacts between the child and his family.

(17) The attitude of other household members about the prospective foster parents' plan to provide foster care.	Discuss, assess, and document the attitudes of other household members toward the plan to provide foster care. Discuss and assess their involvement in the care of children, their attitudes toward foster children, and their acceptance of the verification as a foster family.
(18) The attitude of the prospective foster parents' extended family regarding foster care.	Discuss, assess, and document the extended family's attitude toward foster care and foster children and the involvement the extended family will have with foster children. Discuss and assess the impact the extended family's attitudes will have on the family's ability to provide foster care and whether the extended family will serve as a support system for the foster family and for foster children.
(19) Support systems available to prospective foster parents.	Discuss, assess, and document the support systems available to the foster family and the support they may receive from these resources.
(20) The prospective foster parents' expectations of and plans for foster children.	Discuss, assess, and document the prospective foster parents' expectations of the child and the flexibility of their expectations in relation to the child's actual needs and abilities. Discuss and assess their capacities to recognize and emphasize the strengths and achievements of the child and their capacities to adjust their expectations according to the abilities of the child.
(21) The language(s) spoken by the prospective foster parents.	Document the language(s) spoken by each prospective foster parent.
(22) Prospective foster parent's ability to work with specific kinds of behaviors and backgrounds.	Discuss, assess, and document the prospective foster family's ability to work with specific behaviors, backgrounds, special needs and/or disabilities, and other characteristics of foster children.
(23) Background information from other child-placing agencies.	Request and assess the following background information (if provided) from any child-placing agency that previously conducted a foster screening, pre-adoptive home screening, post placement adoptive report, or home study: (A) The screening, report, home study, and related documentation; (B) Documentation of supervisory visits and evaluations; (C) Any record of deficiencies and their resolutions; and (D) The most current fire and health inspections.

Figure: 40 TAC §749.3137(a)

If the age of the youngest child is…	Then you must have one adult to supervise every (number) child/ren in the group	Swimming Child/Adult Ratio
0 to 23 months old	1	1:1
2 years old	2	2:1
3 years old	3	3:1
4 years old	4	4:1
5 years old or older	8	8:1

Figure: 40 TAC §749.3391(a)

Type of Information:	Including:
(1) Abuse or neglect:	Physical, sexual, or emotional abuse.
(2) Health history:	(A) Current health status; (B) Birth history; (C) Neonatal history; (D) Other medical, psychological, or psychiatric history, including any medication history; (E) Dental history; (F) Immunization record; and (G) Available results of any medical, psychological, psychiatric, and dental examinations.
(3) Social history:	Information about past and existing relations among the child and the child's siblings, birth parents, extended family members, and other persons who have had physical possession of or legal access to the child.
(4) Educational history:	(A) Enrollment and performance in educational institutions; (B) Results of educational testing and standardized tests; and (C) Special educational needs, if any.
(5) Family history:	Information about the child's birth parents, maternal and paternal grandparents, other children born to either of the child's birth parents, and extended family members: (A) Health and medical history, including any information obtained in the medical history report and information regarding genetic diseases or disorders; (B) Current health status; (C) If deceased, cause of and age of death; (D) Height, weight, eye, and hair color; (E) Nationality and ethnic backgrounds; (F) General levels of educational and professional achievements; (G) Religious backgrounds; (H) Results of any psychological, psychiatric, or social evaluations, including the date of any such evaluation, any diagnosis, and a summary of any findings; (I) Any criminal conviction record relating to the following: (i) A misdemeanor or felony classified as an offense against the person or family; (ii) A misdemeanor or felony classified as public indecency; or (iii) A felony violation of a statute intended to control the possession or distribution of a substance included in the Texas Controlled Substances Act; and (J) Any information necessary to determine whether the child is entitled to, or otherwise eligible for, state or federal financial, medical, or other assistance.

Figure: 40 TAC §749.3391(b)

Type of Information:	Including:
(1) History of previous placements:	Information about the child's previous placements, including the date(s) and reason(s) for placement.
(2) Child's legal status:	Information regarding the child's legal status.
(3) Child's understanding of adoptive placement:	Information regarding the child's understanding of adoptive placement.

Figure: 40 TAC §749.3425(a)

If the child:	Then you must have:
(1) Is under the age of two years old and does not need treatment services:	A minimum of five contacts with the child and the adoptive parents within the first six months of placement: (A) Two of the contacts must be face-to-face with the entire prospective adoptive family; and (B) At least one of the two contacts noted above must be in the adoptive home.
(2) Needs treatment services or is two years old or older:	Monthly contacts with the adoptive family during the first six months, two of these contacts must be in the adoptive home with all members of the adoptive family.

Figure: 40 TAC §749.3623

Required Information	Description of Discussion, Assessment, and Documentation Requirements
(1) The age of the adoptive applicants.	All adoptive applicants must be at least 21 years or older. You must include documentation verifying their age.
(2) The marital status of the adoptive applicants including any previous marriages.	If the adoptive applicants are married, you must review and document the marriage license or declaration of marriage record. You must document information about any previous marriages, divorces, or deaths of former spouses.
(3) A history of the adoptive applicants' residence and their citizenship status.	You must document the: (A) Length of time spent at each residence for the past 10 years (street address, city, state); and (B) Citizenship of the adoptive applicants.
(4) The financial status of the adoptive applicants.	Adoptive applicants must be able to meet the child's basic material needs. You must include the family's ability to support a child, employment history, income, expenses, and ability to manage money. You must verify income and insurance coverage.
(5) The results of the criminal history and central registry background checks conducted on the adoptive applicants and any non-client person 14 years of age or older who regularly or frequently stays or works in the home.	Persons applying to adopt children through a child-placing agency, and any non-client person 14 years of age or older who will regularly or frequently be staying or be present at the home while children are being provided care, must obtain a criminal history and central registry background check (See Chapter 745, Subchapter F, of this title (relating to Background Checks)). The results of those checks must be documented in the adoptive home record and the home study.
(6) Health status of the adoptive applicants.	Document information about the physical, mental, and emotional status (including substance abuse history) of all persons living in the home in relation to the family's ability to adopt a child and to assume parenting responsibilities. You must observe these persons for any indication of problems and follow up, where indicated, with a professional evaluation. Document the information obtained through your observations or through a physician's statement. Consideration must be given to the health and age of the adoptive applicants. There must be a plan in place to ensure the child will be raised in a stable and consistent environment to adulthood.
(7) Any disabilities of the adoptive applicants.	A person must not be prohibited from adopting a child solely based on a disability. You must evaluate individuals who are disabled in relation to their adjustment to the disability and any limits the disability imposes on the adoptive applicants' ability to care for a child. This evaluation must be documented in the home study.

(8) The adoptive applicants' motivation for adoption.	Discuss and assess the adoptive applicants' motivation for adoption. You must assess the applicants' motivation and its effect on their ability to accept and parent an adopted child.
(9) The fertility of the adoptive applicants.	Discuss and assess information about the couple's fertility. The applicants' fertility is important only in relation to unresolved feelings about their infertility and their ability to accept and parent a child not born to them.
(10) The quality of the adoptive applicants' marital and family relationships.	Describe the quality of marital and family relationships in relation to the family's ability to adopt and parent a child. You must assess the stability of a couple's relationship, the strengths and problems of the relationship, and how those issues will relate to an adopted child. You must assess the quality of the relationships between the prospective adoptive parents and their biological children, living in or out of the home, strengths and problems of those relationships, and how those issues will relate to an adopted child.
(11) The adoptive applicants' feelings about their childhood and parents.	Discuss and assess adoptive applicants' feelings about their childhoods and parents, including any history of abuse or neglect and their resolution of the experiences.
(12) The adoptive applicants' attitude about an adopted child's religion.	Evaluate adoptive applicants on: (A) Their willingness to respect and encourage a child's religious affiliation, if any; (B) Their willingness to provide a child opportunity for religious and spiritual development, if desired; and (C) The health protection they plan to give a child if their religious beliefs prohibit certain medical treatment.
(13) The adoptive applicants' values, feelings, and practices in regard to child care and discipline.	Discuss and assess the applicants' knowledge of child development and their child-care experience. Discuss and assess the ways the applicants were disciplined as children and their reactions to the discipline they received. Discuss and assess the prospective adoptive parents' discipline styles, techniques, and their ability to recognize and respect differences in children and use discipline methods that suit the individual child. If their current discipline methods are different than those that you approve, discuss and assess how they would change their child care practices to conform with your approved methods.

(14) The adoptive applicants' sensitivity to and feelings about children who may have been subjected to abuse and neglect if the agency may place such children with the adoptive parents.	Discuss and assess the adoptive applicants' understanding of the dynamics of child abuse and neglect. Discuss and assess their understanding of how these issues and experiences affect them, their families, and the children they may adopt. Assess the adoptive family applicants' ability to help children who have been abused or neglected. If the adoptive applicants experienced abuse or neglect as a child, assess the handling of those experiences and assess the impact of those experiences on the applicant's ability to help children deal with their own experiences. Evaluate the availability of family and community resources to meet the needs of the children adopted by the family.
(15) The adoptive applicants' sensitivity to, and feelings for children's experiences of separation from, and the loss of, their biological families.	Discuss and assess the adoptive applicants' understanding of the dynamics of separation and loss and the effects of these experiences on children. Discuss and assess their personal experiences with separation and loss and their processing of those experiences. Assess the applicants' acceptance of the process of grief and loss for children and assess their ability to help children through the grieving process.
(16) The adoptive applicants' sensitivity to, and feelings about, a child's biological family.	Discuss the adoptive applicants' feelings about the child's parents, including those parents who abused or neglected the child. Assess their sensitivity and reactions to the birth parents. Discuss and assess their sensitivity to and acceptance of a child's feelings about his parents and assess their ability to help the child deal with those feelings. Discuss and assess the applicants' sensitivity to and acceptance of the child's relationships with his siblings. Discuss and assess their reactions to the possibility of contacts between the child and his biological family in the future.
(17) The attitude of other family and household members regarding adoption.	Discuss and assess the attitudes of other family and household members toward the plan of adoption. Discuss and assess their involvement in the care of children, their attitudes toward the children, and their acceptance of the adoption plan.
(18) The attitude of the adoptive applicants' extended family regarding adoption.	Discuss the extended family's attitude toward adoption and the involvement the family will have with the adopted children. Discuss and assess their involvement in the care of the children, their attitudes toward adoption, and adopted children.
(19) Support systems available to adoptive applicants and adopted children.	Discuss and assess the support systems available to the adoptive family and the support they may receive from these resources.
(20) The language(s) spoken by the adoptive applicants.	Document the language(s) spoken by each adoptive applicant.

(21) The adoptive applicants' expectations of and plans for adoptive children.	Discuss and assess the prospective adoptive parent's expectations of the child and the flexibility of their expectations in relation to the child's actual needs and abilities. Assess their capacities to recognize and emphasize the strengths and achievements of the child and their capacities to adjust their expectations according to the abilities of the child.
(22) Adoptive applicants' ability to work with specific kinds of behaviors and backgrounds.	Discuss and assess the adoptive applicants' ability to work with and/or willingness to accept specific behaviors, backgrounds, special needs and/or disabilities and other characteristics of children.
(23) Background information from other child-placing agencies.	Request and assess the following background information (if provided) from any child-placing agency that previously conducted a foster screening, pre-adoptive home screening, post placement adoptive report, or home study: (A) The screening, report, home study, and related documentation; (B) Documentation of supervisory visits and evaluations; (C) Any record of deficiencies and their resolutions; and (D) The most current fire and health inspections.

Figure: 40 TAC §750.5(a)(1)

Chapter 749 Terminology	Chapter 750 Terminology
(1) Child-placing agency, agency, or foster home	"Foster home" as defined in this chapter.
(2) Foster family home	"Foster family home" as defined in this chapter.
(3) Foster group home	"Foster group home" as defined in this chapter.

Figure: 40 TAC §750.123

Change:	Deadline for notifying us:
(1) The legal structure of your operation	At least seven working days before making the change
(2) The composition of the governing body	Within two days of such a change
(3) The information about governing body officers, executive committee, or members, such as name or location changes	Within 15 days of learning about a change.

Figure: 40 TAC §750.1009

Change:	Time for notification:
(1) In the location of the foster home.	Before moving.
(2) Major life changes in household composition: (A) Marriage, divorce, separation, death, birth, or any other change in household composition; (B) A serious health problem that affects the ability of the foster parent to care for children; or (C) Extended absences by one parent, such as military services or job assignments.	Before the change occurs, if possible; otherwise, immediately upon discovery.
(3) A change affecting a condition of the license.	Before the change occurs, if possible; otherwise, immediately upon discovery.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Building and Procurement Commission

Request for Proposal

The Texas Building and Procurement Commission (TBPC), on behalf of the Department of Public Safety, announces the issuance of Request for Proposals (RFP) #303-7-10097. TBPC seeks a ten year lease of approximately 4,964 square feet of office space in Arlington, Tarrant County, Texas.

The deadline for questions is September 1, 2006 and the deadline for proposals is September 14, 2006 at 3:00 P.M. The award date is October 5, 2006. TBPC reserves the right to accept or reject any or all proposals submitted. TBPC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TBPC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TBPC Purchaser Myra Beer at (512) 463-5773. A copy of the RFP may be downloaded from the *Electronic State Business Daily* at http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=66789.

TRD-200604720
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: August 25, 2006

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Request for Proposal

The Texas Building and Procurement Commission (TBPC), on behalf of the Department of Banking (DOB), announces the issuance of Request for Proposals (RFP) #303-7-10024-A. TBPC seeks a 5 year lease of approximately 2,830 square feet of office space in the San Antonio area, Bexar County, Texas.

The deadline for questions is September 11, 2006, and the deadline for proposals is September 20, 2006 at 3:00 P.M. The award date is October 16, 2006. TBPC reserves the right to accept or reject any or all proposals submitted. TBPC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TBPC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TBPC Purchaser Myra Beer at (512) 463-5773. A copy of the revised RFP may be downloaded from the *Electronic State Business Daily* at http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=66901.

TRD-200604721
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: August 25, 2006

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Request for Proposal

The Texas Building and Procurement Commission (TBPC), on behalf of the Texas Department of Family and Protective Services (DFPS), announces the issuance of Request for Proposal (RFP) #303-7-10130. TBPC seeks a five (5) or ten (10) year lease of approximately 29,547 square feet of office space in the Amarillo area, Potter and Randall County, Texas.

The deadline for questions is September 12, 2006 and the deadline for proposals is September 25, 2006 at 3:00 P.M. The anticipated award date is October 9, 2006. TBPC reserves the right to accept or reject any or all proposals submitted. TBPC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TBPC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TBPC Purchaser Myra Beer at (512) 463-5773. A copy of the RFP may be downloaded from the *Electronic State Business Daily* at: http://esbd.tbpc.state.tx.us/1380/bid_show?bidid=66956.

TRD-200604808
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: August 29, 2006

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of August 18, 2006, through August 24, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on August 30, 2006. The public comment period for these projects will close at 5:00 p.m. on September 29, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Friendswood Development Company; Location: The project is located along a headwater tributary of Chigger Creek, on the south bank of Clear Creek, in Friendswood, northern Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Algoa, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 28129; Northing: 3265379. Project Description: The applicant proposes to construct an 80-acre residen-

tial development known as West Ranch, in north Galveston County, Texas. The first phase of this development was recently permitted under Nationwide Permit SWG-05-39-012. The drainage modifications proposed under this project include the fill and relocation of an existing headwater for expansion of a drainage/flood control channel and associated on-site wetland mitigation. The drainage improvements will include the construction of four backslope swale drains with associated articulated blocks for erosion control. Two outfall structures will be constructed which will service the proposed wetland migration area. The outfall located on the south side of the mitigation area will consist of an 84-inch storm sewer and associated articulated erosion blocks. The main outfall, located in the central portion of the mitigation area, will consist of three 60-inch and one 72-inch storm sewers and associated erosion blocks. The backslope swale drains and outfall structures are designed in pairs and grouped together within the proposed drainage channel in order to minimize overall wetland and water quality impacts. The applicant proposes to place an estimated 1,330 cubic yards of clean fill material below the ordinary high water mark within the jurisdictional limits of a tributary headwater of Chigger Creek. A total of 0.549 acre (1,974 linear feet) of jurisdictional headwaters will be filled by this project. Specifically, 0.32 acre (945 linear feet) of jurisdictional headwaters will be filled, with a total of 0.228 acre (1,029 linear feet) of jurisdictional headwaters will be relocated by the proposed project. The total 0.548 acres of jurisdictional impacts will be mitigated with the construction of 0.478 acre of wetlands within the bottom of the relocated headwater-drainage channel. The proposed wetland mitigation area will also improve water quality via the tertiary treatment of runoff as it flows through the proposed wetlands. The addition, the applicant agrees to deed restrict 4.75 acres of high quality forested riparian habitat along Chigger Creek as project preservation. The purpose of the fill activity is to provide adequate flood control for the planned residential development while limiting impacts within subject property. The need for the work is to satisfy the requirements of the Galveston County Drainage District and to meet the housing demand of prospective homeowners in the Friendswood sub-region. CCC Project No.: 06-0376-F1; Type of Application: U.S.A.C.E. permit application #24151 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: City of Corpus Christi; Location: The project is located at Laguna Shores Road between Graham and Husslin' Hornet Streets, along the western shore of the Laguna Madre, Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: OSO CREEK NE, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; from Easting: 669,940; Northing: 3,060,190 to Easting: 669,256; Northing: 3,058,695. Project Description: The applicant proposes to elevate the Laguna Shores Drive roadway to ensure traffic flow is maintained during high tides, widen the roadway to accommodate existing and future traffic volumes, build a roadway pavement to withstand expected traffic volumes and loading conditions, provide additional cross roadway drainage to meet future drainage requirements, and provide erosion protection to protect the roadway bed during high tide. The proposed roadbed would be raised an average of approximately two feet. The proposed new pavement would consist of two 12-foot-wide lanes with 4-foot-wide shoulders on each side. Portions of the project area lie within existing wetland areas. Approximately 85,750 square feet of fill will be placed in wetlands and in open waters and approximately 2,800 square feet of wetlands and open waters will be excavated. The applicant has indicated that a detailed mitigation plan for this project will be submitted at a later date. CCC Project No.: 06-0385-F1; Type of Application: U.S.A.C.E. permit application #24279 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200604788

Larry L. Laine

Chief Clerk/Deputy Land Commissioner, General Land Office

Coastal Coordination Council

Filed: August 28, 2006

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/04/06 - 09/10/06 is 18% for Consumer [1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/04/06 - 09/10/06 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3] for the period of 09/01/06 - 09/30/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 09/01/06 - 09/30/06 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/06 - 12/31/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/06 - 12/31/06 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 10/01/06 - 12/31/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The lender credit card quarterly rate as prescribed by §346.101 Tex. Fin. Code[1] for the period of 10/01/06 - 12/31/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4]for the period of 10/01/06 - 12/31/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 10/01/06 - 12/31/06 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 10/01/06 - 12/31/06 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 09/01/06 - 09/30/06 is 8.25% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed §304.003 for the period of 09/01/06 - 09/30/06 is 8.25% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

[3] For variable rate commercial transactions only.

[4] Only for open-end credit as defined in §301.002(14), Tex. Fin. Code.

TRD-200604807
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 29, 2006

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East Texas Council of Governments

Request for Applications to Reimburse Local Organizations

The Texas Health and Human Services Commission (HHSC) awarded the East Texas Council of Governments (ETCOG) a Social Services Block Grant (SSBG) for Emergency Disaster Relief. A portion of these funds may be used to reimburse local organizations for expenses incurred in providing allowable health and human services to individuals affected by Hurricane Rita and Hurricane Katrina. The expenses cannot be previously reimbursed through any other state or federal government source. Expenses that were paid from the receipt of cash donations are not reimbursable. Additionally, reimbursement for donated goods and/or services will also not be allowable.

These services must have been provided to evacuees located in one of the following fourteen (14) counties: Gregg, Harrison, Panola, Marion, Cherokee, Rusk, Smith, Van Zandt, Anderson, Camp, Wood, Rains, Upshur, and Henderson. To apply for reimbursement, a local organization must submit an Application for Reimbursement. ETCOG is, therefore, requesting Applications for Reimbursement from interested East Texas area organizations.

The Request for Application is being released as two separate applications:

(1) Request for Reimbursement Application for previous expenditures for Rita and Katrina evacuees; and/or

(2) Request for Application to provide continuing services to:

(a) promote self-sufficiency and job placement for Rita and Katrina evacuees; and/or

(b) provide social services/health services/maintenance for Rita and Katrina evacuees who cannot live independently.

Organizations may submit one or two applications for reimbursement, as applicable; one application for previous evacuee expenditures, and a second application for reimbursement for continuing services to hurricane evacuees.

In releasing this Request for Applications (RFA), ETCOG is not making a commitment to reimburse an organization based solely on the submittal of the organization's identified expenditures. Local organizations submitting Applications for Reimbursement must establish the amount of funds expended on Hurricane Katrina and/or Hurricane Rita evacuees. Organizations must also submit valid documentation/written verification (i.e. receipts, invoices, spreadsheets, etc.) verifying expenditures per evacuee, and individual FEMA Numbers (for expenditures after 1/1/06). Several of the SSBG eligible services may include, but are not limited to: congregate meals, home-based services, housing services, health related and home health services, legal services, transportation, special services for at risk youth or persons with developmental or physical disabilities, etc.

The contract period for the use of the grant funds is from the date of Hurricane Katrina on August 29, 2005, and/or Hurricane Rita on September 25, 2005, to September 30, 2007. The total amount of grant funds available for Hurricane Rita evacuee expenses is $827,000.00; and $632,916.00 is available for expenditures for Hurricane Katrina. The grant funds will be financed with 100 percent federal funds.

The Applications for Reimbursement will be evaluated by a RFA Review Team, and those organizations that best meet the criteria of the RFA will be awarded a contract for reimbursement. After applications have been approved and reimbursement amounts determined, ETCOG will execute a financial contract with each local organization.

East Texas organizations interested in receiving an Application package(s) should send a request by letter, e-mail or fax. to: Peggy M. Collier, Program Coordinator, East Texas Council of Governments, 3800 Stone Road, Kilgore, TX 75662, or peggy.collier@twc.state.tx.us, or fax to 903-983-1440, Attention: Peggy M. Collier.

Applications must be submitted to ETCOG by 5:00PM on Tuesday, September 19, 2006 by hand delivery or mailed to the following address:

East Texas Council of Governments

Attention: Peggy M. Collier

3800 Stone Road

Kilgore, TX 75662

An Informational Conference regarding the RFA will be conducted at 1:30PM September 7, 2006, at the East Texas Council of Governments, 3800 Stone Road, Kilgore, TX. Questions concerning the RFA process will be addressed at the conference, or may be sent by fax to Peggy M. Collier, Program Coordinator, at 903-983-1440, Attention: Peggy M. Collier; or to peggy.collier@twc.state.tx.us by September 8, 2006.

Historically Underutilized Businesses (HUB) as well as local organizations, i.e. non-profit organizations, faith-based organizations, community-based organizations, educational organizations, and city and county governments are encouraged to submit applications. All programs of ETCOG are equal opportunity entities. Auxiliary aids and services are available, upon request, to those with disabilities. 1-800-735-2988 VOICE, 1-800-735-2989 TDD.

TRD-200604670
Glynn Knight
Executive Director
East Texas Council of Governments
Filed: August 24, 2006

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Texas Education Agency

Request for Applications concerning Texas High School Redesign and Restructuring Grant Progaram, Cycle 3

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-06-025

from eligible school districts or open-enrollment charter schools. An eligible school district or open-enrollment charter school shall include a school district or open-enrollment charter school with one or more eligible high schools. A school district must submit a separate application on behalf of each eligible high school. An eligible school district or open-enrollment charter school may not have more than three high school campuses or more than 33 percent of its comprehensive high school campuses currently awarded any of the following grants: a Texas High School Redesign and Restructuring (TXHSRR) Grant, Cycle 1 or 2; a non-competitive grant for redesign from the TEA; a Comprehensive School Reform (CSR)-Texas High School Initiative grant; or a grant through the privately-funded Texas High School Project's (THSP) Redesigned High School Initiative. An eligible high school is defined as (1) a school serving students in two or more of the following grades: 9, 10, 11, or 12; (2) a school with at least 50 percent of its student population in Grade 9 or higher; (3) a school serving at least 100 students in Grades 9 through 12; (4) a school that, under the Texas accountability rating system, has been rated *Academically Unacceptable* in 2006; and (5) a school that is not a recipient of funds through the TXHSRR Grant, Cycle 1 or 2; a CSR-Texas High School Initiative Grant; or a grant through the privately-funded THSP's Redesigned High School Initiative.

A school district or open-enrollment charter school applying for this grant must be financially viable as determined through fiscal review by the TEA Division of Financial Audits. Additionally, to maintain eligibility for this grant, both the school district or the open-enrollment charter school, and the campus under the school district or open-enrollment charter school, must be in compliance with all intervention requirements as established by the TEA Division of Program Monitoring and Interventions and must attend required training delivered by Region 13 Education Service Center (ESC). In addition, an open-enrollment charter high school campus shall become ineligible for grant funding (or if a campus has applied for and received funding for this grant, will have its grant funding placed on hold) if the commissioner of education notifies the campus' charter holder of the commissioner's intent to revoke or non-renew such charter under Texas Education Code (TEC), Chapter 12, or to close the campus under TEC, Chapter 39, for any of the reasons set forth in either statutory provision. If the commissioner of education ultimately revokes or denies renewal of an open-enrollment charter of a charter holder or closes a campus that has been awarded funds under this grant program, grant funding shall be discontinued.

Description. The purpose of the TXHSRR Grant, Cycle 3, is to provide high school campuses rated *Academically Unacceptable* under the Texas accountability rating system with the resources to build capacity for implementing innovative, schoolwide initiatives designed to improve student performance on the campus. Additionally, this grant seeks to create a demonstration project that will provide case studies and models for successful practices in turning around low-performing high schools. The primary goals of this grant program are to (1) correct the specific area of unacceptable performance identified in the campus accountability rating; (2) increase overall student achievement; (3) create a culture of high academic standards and expectations for all students; (4) demonstrate innovative management, personalization, and instructional practices; (5) ensure that every student is taught by highly qualified, effective teachers; (6) develop leadership capacity in campus and district leaders to support redesign of the campus; and (7) engage parents and the community in school activities.

Dates of Project. The TXHSRR Grant, Cycle 3, will be implemented during the 2006-2007, 2007-2008, and 2008-2009 school years. Applicants should plan for a starting date of no earlier than March 1, 2007, and an ending date of no later than February 28, 2009.

Project Amount. A total of approximately $5 million is available for funding the TXHSRR Grant, Cycle 3. Each high school campus will receive a maximum of $300,000 or $850 per student enrolled on the campus, whichever is the lesser amount, for the 2006-2007 through 2008-2009 project period. This project is funded 100 percent from Rider 59 general revenue funds appropriated by the state legislature.

Selection Criteria. Applications will be selected based on expert reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. From the highest ranking applications, the TEA will select applicants to participate in interview sessions with a review panel in Austin, Texas. Applicants will be required to participate in the interview process to be eligible for funding. Final grant selections will be based on the reviewers' assessment of the grant application and the oral interview.

Technical Assistance. Through the Region 13 ESC, the TEA will provide pre-grant support and guidance in the development of individualized campus redesign plans that address both campus needs and grant requirements. The RFA will specify the time and date for the pre-grant support and guidance sessions. Through the Region 13 ESC, the TEA will also provide direct on-site coaching and required training and on-going regional training and networking activities to those high school campuses that receive the TXHSRR Grant, Cycle 3.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-06-025 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/opge/disc/index.html for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Karen Harmon, Division of Discretionary Grants, TEA, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://www.tea.state.tx.us/opge/disc/index.html.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, October 31, 2006, to be considered for funding.

TRD-200604881
Cristina De La Fuente-Valadez
Director, Policy Coordination Division
Texas Education Agency
Filed: August 30, 2006

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Commission on State Emergency Communications

Public Notice of Workshop

The Commission on State Emergency Communications (CSEC) is conducting a workshop regarding §255.4, Definition of a Local Exchange Access Line or an Equivalent Local Exchange Access Line, on Wednesday, September 13, 2006 from 1:00 pm until 5:00 pm at the William P. Hobby Building, Tower II, room 225, Austin, Texas 78701.

An agenda will be provided prior to the workshop via the CSEC website at www.911.state.tx.us.

Questions concerning the workshop or this notice should be referred to Patrick Tyler, CSEC General Counsel, at (512) 305-6915. Hearing and speech impaired with text telephones may contact the CSEC at (512) 305-6925.

TRD-200604900
Paul Mallett
Executive Director
Commission on State Emergency Communications
Filed: August 30, 2006

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 9, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 9, 2006**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Amarillo Village Cleaners, Inc.; DOCKET NUMBER: 2006-0653-DCL-E; IDENTIFIER: Regulated Entity Reference Number (RN) RN104154034; LOCATION: Amarillo, Randall County, Texas; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102(a), by failing to complete and submit the required registration form; PENALTY: $948; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(2) COMPANY: Arkema Inc.; DOCKET NUMBER: 2006-0614-AIR-E; IDENTIFIER: RN100216373; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: industrial organic chemical plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(b)(2)(F), Air Permit Numbers 865A and PSD-TX-1016, and THSC, §382.085(b), by allegedly exceeding the emission rate for sulfur dioxide from the flare; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: Bay Area Healthcare Group, Ltd. dba Corpus Christi Medical Center; DOCKET NUMBER: 2006-0509-PST-E; IDENTIFIER: RN102978160; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: hospital; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain all underground storage tank (UST) records at the facility and make them available for inspection upon request; and 30 TAC §334.8(c)(4)(A)(vi) and (c)(4)(B), by failing to submit a fully and accurately completed UST registration and self-certification form; PENALTY: $880; ENFORCEMENT COORDINATOR: Christina Martinez, (512) 239-0739; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(4) COMPANY: Cadillac Cleaners Inc. dba Millers Custom Cleaners; DOCKET NUMBER: 2006-1096-DCL-E; IDENTIFIER: RN104674429; LOCATION: Mansfield, Tarrant County, Texas; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration late fees; PENALTY: $948; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: City of Center; DOCKET NUMBER: 2006-0859-PWS-E; IDENTIFIER: RN101390409; LOCATION: Center, Shelby County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5), and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) for total trihalomethane (TTHM) and haloacetic acids (HAA5); PENALTY: $4,200; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: Chasco Constructors, Ltd., LLP; DOCKET NUMBER: 2006-0723-WQ-E; IDENTIFIER: RN104910930; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: commercial development; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $600; ENFORCEMENT COORDINATOR: Brent Hurta, (512) 239-6589; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(7) COMPANY: Clear Creek Rentals, Ltd. dba Tucker Rentals; DOCKET NUMBER: 2006-0834-PWS-E; IDENTIFIER: RN104443791; LOCATION: Killeen, Bell County, Texas; TYPE OF FACILITY: mobile home park with public water supply; RULE VIOLATED: 30 TAC §290.39(e)(1) and THSC, §341.035(c), by failing to submit detailed plans and engineering reports prior to

activating a new public water supply system; PENALTY: $336; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2006-0646-AIR-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County, Texas; TYPE OF FACILITY: petroleum refining and natural gas processing plant; RULE VIOLATED: 30 TAC §116.715(a), TCEQ Flexible Air Permit Number 9868A, Special Condition 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $12,940; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Manny Davila; DOCKET NUMBER: 2006-0629-WOC-E; IDENTIFIER: RN103445524; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: backflow prevention assembly tester; RULE VIOLATED: 30 TAC §30.51(b), the Code, §37.003, and THSC, §341.034(c), by failing to have a license or registration issued by the commission under Texas Water Code, Chapter 37 prior to repairing, testing, and installing backflow prevention assemblies; PENALTY: $150; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(10) COMPANY: Doctors Hospital of Laredo; DOCKET NUMBER: 2006-1254-PST-E; IDENTIFIER: RN101867703; LOCATION: Laredo, Webb County, Texas; TYPE OF FACILITY: hospital; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; and 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1403 Seymour, Suite 2, Laredo, Texas 78040-8752, (956) 791-6611.

(11) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2006-0295-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 18978, Special Condition Number 1, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Jason Kemp, (512) 239-5610; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2006-0515-AIR-E; IDENTIFIER: RN100542281; LOCATION: Channelview, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(c), NSR Air Permit Number 2936, Special Condition 1, and THSC, §382.085(b), by failing to prevent the release of unauthorized emissions; PENALTY: $8,425; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Willie D. Lawson, Sr. dba Evans Ave Cleaners; DOCKET NUMBER: 2006-0845-DCL-E; IDENTIFIER: RN104171632; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $948; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Freer Water Conservation and Improvement District; DOCKET NUMBER: 2006-0481-PWS-E; IDENTIFIER: RN101440204; LOCATION: Freer, Duval County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(A), (e)(4)(C), and (f)(3)(B)(v), and THSC, §341.033(a), by failing to operate the disinfection equipment so as to maintain a free chlorine residual of 0.2 milligrams per liter throughout the distribution system, by failing to employ at least two operators who hold a Class "C" or higher groundwater license and who each work at least 16 hours per month at the public water system's production, treatment, or distribution facilities and by failing to keep on file and make available for commission review calibration records for disinfectant residual analyzers; 30 TAC §290.42(e)(4)(A), by failing to provide a small bottle of fresh ammonia solution for testing for chlorine leakage; 30 TAC §290.43(c)(3), by failing to ensure that the cover of the overflow pipe on the ground storage fits tightly with no gap over 1/16 inch; 30 TAC §290.45(b)(1)(D)(i) and THSC, §341.0315(c), by failing to provide two or more wells with a total capacity of 0.6 gallons per minute (gpm) per connection; 30 TAC §290.110(c)(5)(B) and (e)(4), by failing to keep on file and make available for commission review chlorine monitoring records for weekend monitoring and copies of the quarterly distribution report for public water systems; and 30 TAC §290.41(c)(3)(Q), by failing to provide the opening to the air release device on the well discharge piping with 16-mesh or finer corrosion-resistant screening material or an acceptable equivalent; PENALTY: $1,134; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: City of Giddings; DOCKET NUMBER: 2006-1012-MWD-E; IDENTIFIER: RN101468817; LOCATION: Giddings, Lee County, Texas; TYPE OF FACILITY: domestic wastewater system; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System Permit Number WQ0010456002, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for ammonia-nitrogen; PENALTY: $720; ENFORCEMENT COORDINATOR: Brent Hurta, (512) 239-6589; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: City of Gladewater; DOCKET NUMBER: 2006-0679-PWS-E; IDENTIFIER: RN101176832; LOCATION: Gladewater, Gregg County, Texas; TYPE OF FACILITY: public drinking water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the MCL for TTHM and HAA5; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(17) COMPANY: KB HOME LONE STAR LP; DOCKET NUMBER: 2006-0434-EAQ-E; IDENTIFIER: RN104760707; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval of an Edwards Aquifer Contributing Zone plan prior to the beginning of construction; and 30 TAC §205.6 and the Code, §5.702, by failing to pay general permits stormwater fees; PENALTY: $28,000; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(18) COMPANY: KB HOME LONE STAR LP; DOCKET NUMBER: 2006-0529-EAQ-E; IDENTIFIER: RN104873104; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval to modify a water pollution abatement plan or be

granted an exception to the plan; PENALTY: $600; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(19) COMPANY: Knippa Water Supply Corporation; DOCKET NUMBER: 2006-0684-PWS-E; IDENTIFIER: RN101456671; LOCATION: Uvalde, Uvalde County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(i) and THSC, §341.0315(c), by failing to provide two or more wells having a total capacity of 0.6 gpm per connection; PENALTY: $420; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(20) COMPANY: Kee Ja Rhee dba Lone Star Cleaners; DOCKET NUMBER: 2006-0789-DCL-E; IDENTIFIER: RN104028279; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $711; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Amir Wazir Ali dba Lucky Food Mart; DOCKET NUMBER: 2006-0543-PST-E; IDENTIFIER: RN102016219; LOCATION: Banquete, Nueces County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(22) COMPANY: Lyondell Chemical Company; DOCKET NUMBER: 2006-0570-AIR-E; IDENTIFIER: RN102523107; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F), NSR Permit Number 9395, General Condition Number 8, and THSC, §382.085(b), by failing to comply with permitted emission limits for volatile organic compounds; PENALTY: $3,162; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Mak Foster Ranch, L.P.; DOCKET NUMBER: 2006-0753-EAQ-E; IDENTIFIER: RN102734399; LOCATION: Hays County, Texas; TYPE OF FACILITY: single family subdivision construction site; RULE VIOLATED: 30 TAC §213.23(a)(1) and (j), and Edwards Aquifer Protection Program File Number 02050701, Standard Conditions Number 7, by failing to submit and receive approval of modifications to an Edwards Aquifer Contributing Zone Plan prior to performing a regulated activity and by failing to maintain erosion and sediment controls; and the Code, §26.121(a) and Edwards Aquifer Protection Program File Number 02050701, Special Conditions II, by failing to prevent the unauthorized discharge of sediment laden stormwater; PENALTY: $4,800; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(24) COMPANY: Monarch Utilities I, L.P.; DOCKET NUMBER: 2006-0610-PWS-E; IDENTIFIER: RN101251403; LOCATION: Bandera, Bandera County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the MCL for TTHM; PENALTY: $745; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(25) COMPANY: Iqbal Sadruddin dba Mr. Clean Cleaners; DOCKET NUMBER: 2006-0787-DCL-E; IDENTIFIER: RN103953444; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $711; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: Orange County; DOCKET NUMBER: 2006-0387-PST-E; IDENTIFIER: RN102051398; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: aircraft refueling; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and (B)(ii), by failing to make available to a common carrier a valid, current delivery certificate and by failing to timely renew a previously issued UST delivery certificate; 30 TAC §334.50(b)(2)(A)(i)(II) and the Code, §26.3475(a), by failing to test the line leak detectors for performance and operational reliability; and 30 TAC §334.10(b), by failing to maintain all UST records at the facility and make available for inspection; PENALTY: $2,460; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(27) COMPANY: Betty Porter dba Overton Mustang Cleaners Copies and More; DOCKET NUMBER: 2006-0849-DCL-E; IDENTIFIER: RN104957196; LOCATION: Overton, Rusk County, Texas; TYPE OF FACILITY: active dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $711; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(28) COMPANY: Pedernales Electric Cooperative, Inc.; DOCKET NUMBER: 2006-0923-PST-E; IDENTIFIER: RN101433605; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Christina Martinez, (512) 239-0739; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(29) COMPANY: Phelps Dodge Refining Corporation; DOCKET NUMBER: 2006-0566-IHW-E; IDENTIFIER: RN101463644; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: copper refinery; RULE VIOLATED: 30 TAC §335.2(b), by failing to prevent the disposal of hazardous waste at an unauthorized facility; 30 TAC §335.69(a) and (a)(1)(A), and §335.112(a)(8) and 40 CFR §262.34(a) and (a)(1)(i), and §265.174, by failing to ensure that hazardous waste is not accumulated on-site for more than 90 days without a permit and by failing to conduct weekly inspections of container storage areas; and 30 TAC §335.62 and §335.504 and 40 CFR §262.11, by failing to conduct a hazardous waste determination at the time the waste was generated; PENALTY: $19,800; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(30) COMPANY: John A. Dunaway dba Plaza Cleaners; DOCKET NUMBER: 2006-1011-DCL-E; IDENTIFIER: RN104968516; LOCATION: Amarillo, Randall County, Texas; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by com-

pleting and submitting the required registration form; PENALTY: $711; ENFORCEMENT COORDINATOR: Christina Martinez, (512) 239-0739; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(31) COMPANY: Alford Barron dba Red Barron Sand & Gravel; DOCKET NUMBER: 2006-0559-MSW-E; IDENTIFIER: RN104897798; LOCATION: Denison, Grayson County, Texas; TYPE OF FACILITY: equipment maintenance and storage; RULE VIOLATED: 30 TAC §330.15(c) (formerly 30 TAC §330.5(c)) and the Code, §26.121(a)(1), by failing to dispose of municipal solid waste (MSW) at an authorized facility and by failing to prevent unauthorized discharges of MSW into or adjacent to waters in the state; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Dana Shuler, (512) 239-2505; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(32) COMPANY: Chulwoong Lee dba Silver Dry Cleaners; DOCKET NUMBER: 2006-0850-DCL-E; IDENTIFIER: RN104967948; LOCATION: Euless, Tarrant County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $948; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: Southwest Land Services, Inc. dba Adkins Ranch; DOCKET NUMBER: 2006-0620-EAQ-E; IDENTIFIER: RN104910823; LOCATION: Leander, Williamson County, Texas; TYPE OF FACILITY: limestone quarry and construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Protection Plan prior to initiating construction; PENALTY: $4,800; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(34) COMPANY: S.S.P. C-Store, Inc. dba Speedy Food Mart; DOCKET NUMBER: 2006-0519-PST-E; IDENTIFIER: RN104762737; LOCATION: Sachse, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), (b)(2), (b)(2)(A)(i)(III), (d)(1)(B)(ii) and (d)(1)(B)(iii)(I), and the Code, §26.3475(a) and (c)(1), by failing to monitor USTs for a release, by failing to provide release detection for the piping associated with the USTs, by failing to test the line leak detectors, and by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.10(b), by failing to have the required UST records readily accessible and available for inspection; 30 TAC §115.246(1) and (6) and THSC, §382.085(b), by failing to maintain Stage II records; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to make every current employee aware of the purposes and correct operating procedures of the Stage II vapor recovery system; and 30 TAC §115.245(1) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $6,400; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Hyunsuk Park dba Sunshine Cleaners; DOCKET NUMBER: 2006-0848-DCL-E; IDENTIFIER: RN104950274; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $711; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(36) COMPANY: Jo Dell Smith dba TLC Kleaners and Laundry; DOCKET NUMBER: 2006-0618-DCL-E; IDENTIFIER: RN104956560; LOCATION: Cuero, De Witt County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form; PENALTY: $854; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(37) COMPANY: YTK Enterprises, Inc. dba Comet One Hour Cleaners and dba The Cleaners; DOCKET NUMBER: 2006-0839-DCL-E; IDENTIFIER: RN102413143 and RN104065776; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: dry cleaning facilities; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facilities' registration by completing and submitting the required registration form; PENALTY: $1,422; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200604811

Mary R. Risner

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: August 29, 2006

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Enforcement Orders

A motion to vacate default order was entered regarding Mary Fielder dba End of the Trail, Docket No. 2000-1254-PWS-E on 08/23/2006.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mohammad Salman dba Jeff's Grocery, Docket No. 2003-1154-PST-E on 08/14/2006 assessing $11,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Larry Beakey dba BBT Investments, Docket No. 2004-0381-PST-E on 08/23/2006 assessing $5,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding YFZ Land L.L.C., Docket No. 2004-0800-MLM-E on 08/14/2006 assessing $20,373 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Adrian Astello dba Astello Stone, Docket No. 2004-1152-WQ-E on 08/23/2006 assessing $6,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Arkema, Inc., Docket No. 2004-1702-AIR-E on 08/14/2006 assessing $9,594 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Davis, Staff Attorney at (512) 239-5487, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Toko Foko Inc. dba MSM Food Mart, Docket No. 2004-1785-PST-E on 08/14/2006 assessing $7,650 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding D & H Pump Service, Inc., Docket No. 2004-1968-AIR-E on 08/14/2006 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Dexter Simpson, Docket No. 2004-1971-PST-E on 08/14/2006 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Davis, Staff Attorney at (512) 239-5487, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Blas Compean dba The Wright Stop, Docket No. 2004-2077-AIR-E on 08/23/2006 assessing $1,040 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Justin Lannen, Staff Attorney at (817) 588-5927, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Metroplex Sand & Gravel, Ltd., Docket No. 2004-2094-WQ-E on 08/14/2006 assessing $5,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flint Hills Resources L.P., Docket No. 2005-0018-AIR-E on 08/14/2006 assessing $21,925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Golden Horn Corporation dba Cat Corner, Docket No. 2005-0271-PST-E on 08/23/2006 assessing $6,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Oil Corporation, Docket No. 2005-0289-AIR-E on 08/23/2006 assessing $65,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bluff Springs Food Mart, Inc. dba Mr. MC's Grocery & Market, Docket No. 2005-0403-PST-E on 08/23/2006 assessing $16,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Justin Lannen, Staff Attorney at (817) 588-5927, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rivero Restaurants, Inc., Docket No. 2005-0862-PWS-E on 08/14/2006 assessing $1,830 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Kelso Water System, Inc. 1, 2 and 3, Docket No. 2005-1054-MLM-E on 08/14/2006 assessing $31,576 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Point, Docket No. 2005-1092-PWS-E on 08/23/2006 assessing $700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Davis, Staff Attorney at (512) 239-5487, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Town of Hackberry, Docket No. 2005-1107-MWD-E on 08/14/2006 assessing $21,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Waco Infinity Properties, Ltd., Docket No. 2005-1186-AIR-E on 08/14/2006 assessing $1,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Benbrook, L.L.C. dba Benbrook Village MHP Wastewater Treatment Facility, Docket No. 2005-1337-MWD-E on 08/23/2006 assessing $6,552 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Sigman, Staff Attorney at (512) 239-0619, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hazrat Syed Ahmed dba Ezy Stop, Docket No. 2005-1374-PST-E on 08/23/2006 assessing $5,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James R. Maib dba Coleto Water Company, Inc. dba H20 Systems Plus, Inc., Docket No. 2005-1383-PWS-E on 08/23/2006 assessing $2,840 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding N.T. Petroleum-Bedford, L.L.C., Docket No. 2005-1403-PST-E on 08/23/2006 assessing $2,910 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Jon A Friend dba Besaw's Cafe, Docket No. 2005-1487-PWS-E on 08/14/2006 assessing $12,925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Sigman, Staff Attorney at (512) 239-0619, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rudolphs, Inc., Docket No. 2005-1514-PST-E on 08/14/2006 assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Sigman, Staff Attorney at (512) 239-0619, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Big Chipper of Texas, Inc., Docket No. 2005-1521-MSW-E on 08/14/2006 assessing $4,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Katy Family YMCA, Docket No. 2005-1564-PWS-E on 08/14/2006 assessing $635 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Highness Enterprises, Inc. dba All Time Food Store, Docket No. 2005-1571-PST-E on 08/14/2006 assessing $5,680 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Plain-O-Gas Inc, Docket No. 2005-1646-PST-E on 08/23/2006 assessing $3,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Sigman, Staff Attorney at (512) 239-0619, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shawn & Sameer, Inc. dba Lawn Minit Mart, Docket No. 2005-1664-PST-E on 08/23/2006 assessing $6,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Jerry Barger dba Barger Salvage Yard, Docket No. 2005-1665-WQ-E on 08/14/2006 assessing $5,350 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Silverlake Church, Docket No. 2005-1682-PWS-E on 08/23/2006 assessing $2,398 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Sigman, Staff Attorney at (512) 239-0619, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Imthkn Acquisitions, L.L.C., Docket No. 2005-1699-IHW-E on 08/23/2006 assessing $15,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Henk Post dba Henk Post Farm, Docket No. 2005-1743-MLM-E on 08/23/2006 assessing $14,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Poalson Investments, L.L.C., Docket No. 2005-1766-PWS-E on 08/23/2006 assessing $4,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chambers County, Docket No. 2005-1835-IHW-E on 08/14/2006 assessing $5,460 in administrative penalties with $1,092 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Staff Attorney at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hunters Creek Business Park, Ltd., Docket No. 2005-1873-EAQ-E on 08/14/2006 assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of New Summerfield, Docket No. 2005-1931-PWS-E on 08/23/2006 assessing $325 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Cooper, Docket No. 2005-1998-MWD-E on 08/14/2006 assessing $6,525 in administrative penalties with $1,305 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gary Stahlheber dba Oakridge Mobile Home Park, Docket No. 2005-2061-OSS-E on 08/23/2006 assessing $1,650 in administrative penalties with $330 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Troy, Docket No. 2005-2094-MWD-E on 08/14/2006 assessing $63,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enbridge Pipelines East Texas, L.P., Docket No. 2006-0092-AIR-E on 08/23/2006 assessing $19,600 in administrative penalties with $3,920 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Burgess, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Huntsman Petrochemical Corporation, Docket No. 2006-0107-AIR-E on 08/14/2006 assessing $15,798 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Staff Attorney at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Southside Place, Docket No. 2006-0122-MWD-E on 08/14/2006 assessing $9,320 in administrative penalties with $1,864 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Staff Attorney at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2006-0132-AIR-E on 08/23/2006 assessing $12,616 in administrative penalties with $2,523 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ABF Freight System, Inc., Docket No. 2006-0135-PST-E on 08/23/2006 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of McGregor, Docket No. 2006-0137-PWS-E on 08/23/2006 assessing $2,008 in administrative penalties with $402 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company, L.P., Docket No. 2006-0147-AIR-E on 08/23/2006 assessing $19,800 in administrative penalties with $3,960 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Three Lakes Land Co., L.L.C., Docket No. 2006-0151-MSW-E on 08/23/2006 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Jason Kemp, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Milwhite, Inc., Docket No. 2006-0158-AIR-E on 08/23/2006 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Burgess, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roger Rutledge, Docket No. 2006-0159-LII-E on 08/23/2006 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mansoor Khawaja da CJ's One Stop 2, Docket No. 2006-0172-PWS-E on 08/23/2006 assessing $1,313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (210) 490-3095, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jarrell Texaco, Inc., Docket No. 2006-0181-PST-E on 08/23/2006 assessing $7,650 in administrative penalties with $1,530 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Adeel, Inc. dba Carson Food Market, Docket No. 2006-0182-PST-E on 08/23/2006 assessing $35,000 in administrative penalties with $7,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Dow Chemical Company, Docket No. 2006-0187-AIR-E on 08/23/2006 assessing $2,350 in administrative penalties with $470 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BP Products North America, Inc., Docket No. 2006-0196-AIR-E on 08/23/2006 assessing $62,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Parker-Hannifin Corporation, Docket No. 2006-0203-AIR-E on 08/23/2006 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dennis O. Brito, Docket No. 2006-0204-LII-E on 08/23/2006 assessing $625 in administrative penalties with $125 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Enclave At Canyon Lake, Ltd., Docket No. 2006-0213-EAQ-E on 08/23/2006 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Akber R. Kurji dba Collins Food Store, Docket No. 2006-0215-PST-E on 08/14/2006 assessing $8,400 in administrative penalties with $1,680 deferred.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weldon W. Alders dba Southampton Subdivision and dba Meadow Glen Crystal Springs Water, Docket No. 2006-0217-PWS-E on 08/23/2006 assessing $9,660 in administrative penalties with $1,932 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Coronado Golf And Country Club, Docket No. 2006-0224-PST-E on 08/14/2006 assessing $3,420 in administrative penalties with $684 deferred.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cibolo Grocery Store, Inc., Docket No. 2006-0226-PST-E on 08/23/2006 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Mahr, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Moss Bluff HUB Partners, L.P., Docket No. 2006-0231-AIR-E on 08/23/2006 assessing $70,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Marjorie Powell, Docket No. 2006-0234-LII-E on 08/23/2006 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Altaf Food Store, Inc. dba Pennysaver Foodstore, Docket No. 2006-0235-PST-E on 08/23/2006 assessing $8,800 in administrative penalties with $1,760 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lyondell Chemical Company, Docket No. 2006-0236-AIR-E on 08/23/2006 assessing $18,700 in administrative penalties with $3,740 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Optimist Club of Town & Country, Round Rock, Texas, Docket No. 2006-0237-EAQ-E on

08/23/2006 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Innovene USA, L.L.C., Docket No. 2006-0242-AIR-E on 08/23/2006 assessing $27,450 in administrative penalties with $5,490 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Malik Enterprises, Inc. dba KC2 Grocery Store, Docket No. 2006-0245-PST-E on 08/23/2006 assessing $10,700 in administrative penalties with $2,140 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jerry, Jr., Inc dba Country Store, Docket No. 2006-0256-PST-E on 08/23/2006 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Christina Martinez, Enforcement Coordinator at (512) 239-0739, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Baba Sadiq Investments, Inc. dba Rite Track 5, Docket No. 2006-0259-PST-E on 08/23/2006 assessing $18,415 in administrative penalties with $3,683 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hirschfeld Steel Co Inc, Docket No. 2006-0263-MLM-E on 08/14/2006 assessing $4,312 in administrative penalties with $862 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Staff Attorney at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Choice Petroleum, Inc. dba Gators 2, Docket No. 2006-0274-PST-E on 08/23/2006 assessing $5,814 in administrative penalties with $1,163 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gregory Scott Sharp dba D&G Sprinklers, Docket No. 2006-0280-LII-E on 08/14/2006 assessing $394 in administrative penalties with $79 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Springtown Independent School District, Docket No. 2006-0287-MWD-E on 08/23/2006 assessing $5,350 in administrative penalties with $1,070 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Frost, Docket No. 2006-0297-MWD-E on 08/14/2006 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cemex, Inc., Docket No. 2006-0303-AIR-E on 08/23/2006 assessing $108,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Angelina and Neches River Authority Industrial Development Corporation, Docket No. 2006-0305-MWD-E on 08/14/2006 assessing $5,600 in administrative penalties with $1,120 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Centex Materials L.L.C., Docket No. 2006-0316-IWD-E on 08/14/2006 assessing $4,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Arthur Thompson Post No 8905, Veteran of Foreign Wars of The United States, Cypress, Texas, Docket No. 2006-0318-PWS-E on 08/23/2006 assessing $1,980 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wall Co-Operative Gin, Docket No. 2006-0319-AIR-E on 08/14/2006 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Staff Attorney at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dupont Performance Elastomers L.L.C., Docket No. 2006-0329-AIR-E on 08/14/2006 assessing $2,525 in administrative penalties with $505 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oscar S. Knowles, Jr. dba Donna's Pak a Sak, Docket No. 2006-0334-PST-E on 08/14/2006 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Mahr, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Childress Creek Water Supply Corporation, Docket No. 2006-0336-PWS-E on 08/14/2006 assessing $3,650 in administrative penalties with $730 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at (512) 239-2670, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nova Chemicals, Inc., Docket No. 2006-0355-AIR-E on 08/14/2006 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Waste Works L.L.C., Docket No. 2006-0368-MSW-E on 08/14/2006 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Marlin Bullard, Enforcement Coordinator at (254) 751-0335, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Charles H. Preddy, Docket No. 2006-0369-PST-E on 08/14/2006 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Mahr, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Buda, Docket No. 2006-0390-WQ-E on 08/23/2006 assessing $2,700 in administrative penalties with $540 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James Bob Childress, Docket No. 2006-0397-PST-E on 08/14/2006 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Christina Martinez, Enforcement Coordinator at (512) 239-0739, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Alvarado, Docket No. 2006-0404-MLM-E on 08/23/2006 assessing $3,900 in administrative penalties with $780 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Post Oak Development of Texas, Inc., Docket No. 2006-0425-PWS-E on 08/14/2006 assessing $214 in administrative penalties with $43 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weatherford International, Inc., Docket No. 2006-0426-WQ-E on 08/14/2006 assessing $3,675 in administrative penalties with $735 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enbridge Pipelines (NE Texas), L.P., Docket No. 2006-0448-AIR-E on 08/23/2006 assessing $2,600 in administrative penalties with $520 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Robert N. Freeman, II dba Las Aves Country Retreat, Docket No. 2006-0451-PWS-E on 08/14/2006 assessing $525 in administrative penalties with $105 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Larry Stewart Custom Homes, L.P., Docket No. 2006-0482-WQ-E on 08/14/2006 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J. A. Hatfield, Inc., Docket No. 2006-0492-WQ-E on 08/14/2006 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wholearth Organic Composting, L.L.C., Docket No. 2006-0501-MSW-E on 08/14/2006 assessing $1,120 in administrative penalties with $224 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fred E. Koricanek, Docket No. 2006-0526-AGR-E on 08/23/2006 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2006-0532-AIR-E on 08/23/2006 assessing $700,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Enforcement Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Hooma Investments, Inc., Docket No. 2006-0640-PST-E on 08/14/2006 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Hexion Specialty Chemicals, Inc., Docket No. 2006-0644-WQ-E on 08/14/2006 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Charles E. Tenery, Sr., Docket No. 2006-0669-MSW-E on 08/14/2006 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jayme Sadlier, Central Office Investigator at (512) 239-1683, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Patiala Petroleum, L.L.C. dba Cherry Lane Food Mart, Docket No. 2006-0755-PST-E on 08/23/2006 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Curtis Houck, Docket No. 2006-0858-OSI-E on 08/23/2006 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Prairie View, Docket No. 2006-0205-MWD-E on 08/23/2006 assessing $3,250 in administrative penalties with $650 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200604898

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 30, 2006

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Notice of District Petition

Notices mailed August 24, 2006 through August 29, 2006

TCEQ Internal Control No. 05012006-D01; BEXAR METROPOLITAN WATER DISTRICT of Bexar, Medina, Atascosa, and Comal Counties (the District) has filed an application with the Texas Commission on Environmental Quality (TCEQ) for authority to levy impact fees of $2,556 per equivalent dwelling unit for new connections to the water system within or near all of the service areas of Bexar Metropolitan Water District. The District files this application under the authority of Chapter 395 of the Local Government Code, 30 Texas Administrative Code Chapter 293 and the procedural rules of the TCEQ. The purpose of impact fees is to generate revenue to recover the costs of capital improvements and facility expansions made necessary by and attributable to serving new development in the District's service area. At the direction of the District, a registered engineer has prepared a capital improvements plan for the system which identifies the capital improvements or facility expansions and their costs for which the impact fees will be assessed. The impact fee application and supporting information are available for inspection and copying during regular business hours in the Utilities and Districts Section of the Water Supply Division, Third Floor of Building F (in the TCEQ Park 35 Office Complex located between Yager & Braker Lanes on North IH-35), 12100 Park 35 Circle, Austin, Texas 78753. A copy of the impact fee application and supporting information, as well as the capital improvements plan, is available for inspection and copying at the Bexar Metropolitan Water District's office during regular business hours. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days after the newspaper publication of this notice.

TCEQ Internal Control No. 08162006-D03; BGM land Investments, Ltd. (Petitioner) filed a petition for creation of Harris County Municipal Utility District No. 462 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District, (3) the proposed District will contain approximately 154.82 acres located within Harris County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2006-193, effective February 22, 2006, the City of Houston, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $15,800,000.

TCEQ Internal Control No. 05032006-D06; Copeville Water Supply Corporation (Petitioner) has filed a petition with the Texas Commission on Environmental Quality (TCEQ) to convert Copeville Water Supply Corporation to Copeville Special Utility District (District) and to transfer Certificate of Convenience and Necessity (CCN) No. 11376 from Copeville Water Supply Corporation to Copeville Special Utility District. Copeville Special Utility District's business address will be: P.O. Box 135; Copeville, Texas 75121. The petition was filed pursuant to Chapters 49 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TCEQ. The proposed District is located in Collin County and will contain approximately 13,577 acres. The territory to be included within the proposed

District includes all of the singularly certified service area covered by CCN No. 11376. CCN No. 11376 will be transferred after a positive confirmation election. The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice.

TCEQ Internal Control No. 06062006-D02; Four Way Water Supply Corporation (Petitioner) has filed a petition with the Texas Commission on Environmental Quality (TCEQ) to convert Four Way Water Supply Corporation to Four Way Special Utility District (District) and to transfer Certificate of Convenience and Necessity (CCN) No. 11032 from Four Way Water Supply Corporation to Four Way Special Utility District. Four Way Special Utility District's business address will be: P.O. Box 250; Huntington, Texas 75949. The petition was filed pursuant to Chapters 49 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TCEQ. The proposed District is located in Angelina County and will contain approximately 67,908 acres. The territory to be included within the proposed District includes all of the singularly certified service area covered by CCN No. 11032. CCN No. 11032 will be transferred after a positive confirmation election. The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team at 1-512-239-4691. Si desea información en Español, puede llamar al 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200604896

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 30, 2006

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Notice of Intent to Perform Removal Action at the Spector Salvage Yard Proposed State Superfund Site, Orange, Orange County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for Spector Salvage Company Proposed state Superfund site (the site). The site, including all land, structures, appurtenances, and other improvements, is approximately four acres and is located in the southern portion of the city of Orange, Orange County, Texas. The property is bordered by Polk Street and the Union Pacific Railroad tracks to the north, Jackson Street and the Evergreen Cemetery to the south, a railroad right-of-way and railroad yard to the east, and the City of Orange sewage treatment plant to the west. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

In addition to general salvage, the site owners received military surplus equipment and supplies purchased from military, industrial, and chemical facilities. The salvage yard ceased operations in 1971. The contaminants of concern in soil at the Spector Salvage Yard Proposed state Superfund site include polyaromatic hydrocarbons, PCBs, and heavy metals. The contaminants of concern in groundwater include volatile organic constituents.

The site is proposed for listing under THSC, Chapter 361, Subchapter F. The removal action will protect groundwater from additional releases, and can be completed without extensive investigation and planning. The removal action will also result in a significant cost reduction for the site cleanup. The removal action will consist of excavation and offsite disposal of soil containing concentrations of hazardous substances above commercial/industrial use cleanup levels.

A portion of the records for this site is available for review during regular business hours at the Orange Public Library, 220 North Fifth Street, Orange, Texas 77630-5796, (409) 883-1086. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information, please contact Carol Boucher, P.G., TCEQ Project Manager, Remediation Division, or Bruce McAnally, TCEQ Community Relations Coordinator, at (800) 633-9363.

TRD-200604812
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 29, 2006

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations, the proposed penalty, and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 9, 2006**. The commission will consider any written comments received; and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 9, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Kyle Hickam dba Cartwright Bar B Que; DOCKET NUMBER: 2005-1197-PWS-E; TCEQ ID NUMBER: RN101245280; LOCATION: 3130 West Whitestone Boulevard, Cedar Park, Travis County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and THSC, §341.033(d), by failing to perform routine monthly bacteriological sampling of the public water supply for the months of July - December 2004, and January and February 2005; and 30 TAC §290.122(c)(2)(B), by failing to provide public notification of the failure to conduct routine bacteriological monitoring during the months of July - December 2004, and January and February 2005; PENALTY: $2,840; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(2) COMPANY: Larry Don Howard, R.S.; DOCKET NUMBER: 2006-0024-OSI-E; TCEQ ID NUMBER: RN103574877; LOCATION: 208 Packer Drive, Fate, Rockwall County, Texas; TYPE OF FACILITY: on-site sewage facility (OSSF) at a single family residence; RULES VIOLATED: 30 TAC §285.63(a)(2), (a)(3), and (b), by failing to perform services associated with construction of an OSSF located at the site under direct supervision or direction from an installer holding a current license; and 30 TAC §285.61(4) and THSC, §366.051(c), by failing to obtain documentation that the owner or owner's agent had the permitting authority's authorization to construct prior to the installation of an OSSF; PENALTY: $875; STAFF ATTORNEY: Rachael Gaines, Litigation Division, MC 175, (512) 239-0078; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Milton Doss; DOCKET NUMBER: 2005-1584-MLM-E; TCEQ ID NUMBER: RN104601877; LOCATION: 5500-5490 Greenforest Lane outside of Texarkana, Bowie County, Texas; TYPE OF FACILITY: property involving the management or disposal of municipal solid waste; RULES VIOLATED: 30 TAC §330.4(a) and TWC, §26.121(c), by failing to dispose of municipal solid waste, scrap tires, five-gallon plastic buckets, air conditioning refrigerant bottles, refrigerators, sofas, mattresses, carpet, carpet pad, construction debris, trees, and brush at an authorized site and by failing to prevent an unauthorized discharge into or adjacent to waters in the State; 30 TAC § 111.219(7) and THSC, §382.085(b), by burning unauthorized materials including scrap tires, construction debris, plastics, railroad ties, shingles, freon cylinders, and municipal solid waste at the site; and 30 TAC §330.4(a) and TWC, §26.121(c), by failing to dispose of municipal solid waste, scrap tires, construction debris, trees, and brush at an authorized site and by failing to prevent an unauthorized discharge into or adjacent to waters in the State; PENALTY: $6,000; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(4) COMPANY: Sak Diamond Petroleum; DOCKET NUMBER: 2005-1657-PWS-E; TCEQ ID NUMBER: RN101446698; LOCATION: 9800 Interstate 20, Canton, Van Zandt County, Texas; TYPE OF FACILITY: non-community public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect and submit routine monthly bacteriological samples and by failing to notify the public of the omissions during the months of June, July, and September 2004 and January - December 2005; PENALTY: $4,763; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

TRD-200604815
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 29, 2006

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 9, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 9, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Abdul H. Aziz Al-Surmi aka Aziz Al-Surmi dba Yemco Petroleum; DOCKET NUMBER: 2003-0953-PST-E; TCEQ ID NUMBER: RN101494268; LOCATION: 5327 Cameron Road, Austin, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); PENALTY: $4,750; STAFF ATTORNEY: Courtney St. Julian, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(2) COMPANY: CWB Tire Repair & Automotive, Inc. dba CWB Tire Repair & Automotive; DOCKET NUMBER: 2004-2010-PST-E; TCEQ ID NUMBERS: 3096 and RN101674588; LOCATION: 102 West Wallace Street, San Saba, San Saba County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $2,850; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Fillibusters, LLC dba Southwest Cafe and Market; DOCKET NUMBER: 2004-1652-PST-E; TCEQ ID NUMBER: RN103711164; LOCATION: 19720 United States Highway 281 South, San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and Texas Water Code (TWC), §26.3475(c)(1), by failing to ensure that all tanks are monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; PENALTY: $4,500; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: General Dynamics OTS (Garland), L.P.; DOCKET NUMBER: 2005-1672-AIR-E; TCEQ ID NUMBER: RN102660909; LOCATION: 1200 North Glenbrook Drive, Garland, Dallas County, Texas; TYPE OF FACILITY: ordinance production facility; RULES VIOLATED: New Source Review (NSR) permit No. 51412 General Condition No. 8, 30 TAC §116.115(b)(2)(F) and Texas Health Safety Code (THSC), §382.085(b), by failing to comply with permitted Maximum Allowable Emission Rates for the plaforization system at emission point number 7-PLAF-PRETREAT for volatile organic compounds (VOCs); PENALTY: $86,775; STAFF ATTORNEY: Amie Richardson, Litigation Division, MC 175, (512) 239-2999; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Jay Leslie, Inc. dba Marks Crane & Rigging Co.; DOCKET NUMBER: 2005-1794-UIC-E; TCEQ ID NUMBER: RN102868999; LOCATION: 6501 East Interstate 20, Odessa, Ector County, Texas; TYPE OF FACILITY: industrial equipment rental facility; RULES VIOLATED: 30 TAC §331.3(a) and TWC, §27.011, by failing to obtain a permit or authorization from the commission prior to the use or the operation of an injection well, which caused or allowed the movement of fluid that could result in the pollution of an underground source of drinking water; PENALTY: $2,250; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(6) COMPANY: Mastercraft Industries, Inc. L.P.; DOCKET NUMBER: 2005-0539-AIR-E; TCEQ ID NUMBER: RN100209881; LOCATION: 1106 Industrial Road, Mt. Pleasant, Titus County, Texas; TYPE OF FACILITY: decorative wood products manufacturing plant; RULES VIOLATED: 30 TAC §122.146(2) and §122.145(2)(C), and THSC, §382.085(b), by failing to timely submit annual compliance certifications and the associated deviation reports for Title V Federal Operating Permit No. O-0112; for September 16 - October 9, 2000, October 10, 2001 - September 27, 2002, September 28, 2002 - September 27, 2003, and September 28, 2003 - September 2, 2004 reporting periods; 30 TAC §122.121 and THSC, §382.085(b) and §382.054, by failing to have authorization to operate emissions units at a major source; PENALTY: $11,250; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(7) COMPANY: Pat, Inc. dba Action Excavating; DOCKET NUMBER: 2004-2082-MLM-E; TCEQ ID NUMBER: RN100756097; LOCATION: 6824 Oak Crest Drive West, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: excavating and heavy equipment service facility; RULES VIOLATED: 30 TAC §334.49(a)(4) and TWC, §26.3475(d), by failing to provide corrosion protection to the UST; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method of release detection which is capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping and other underground ancillary equipment; 30 TAC §334.7(a)(1) and TWC, §26.346, by failing to register with the commission, on authorized commission forms, a UST in existence on or after September 1, 1987; 30 TAC §335.4, by failing to prevent an unauthorized discharge of used oil and other wastes to surface soils and storm water drainage at the facility; 30 TAC §335.62 and 40 Code of Federal Regulations §262.11, by failing to conduct a hazardous waste determination on the contents of an unlabeled 55-gallon drum that was observed on the west side of the facility; PENALTY: $9,660; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Ricky Jon Penick; DOCKET NUMBER: 2005-0929-LII-E; TCEQ ID NUMBER: RN103405221; LOCATION: College Station, Brazos County, Texas; TYPE OF FACILITY: landscape irrigation systems; RULES VIOLATED: 30 TAC §30.5(a) and (b) and

§334.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold a current, valid irrigator license issued by the TCEQ prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing landscape irrigation systems; PENALTY: $10,000; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: Sea Lion Technology, Inc.; DOCKET NUMBER: 2005-0143-IWD-E; TCEQ ID NUMBER: RN100870179; LOCATION: 5700 Century Boulevard, Texas City, Galveston County, Texas; TYPE OF FACILITY: industrial wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121, and Texas Pollutant Discharge Elimination System (TPDES) Permit No. 03479, Effluent Limitations and Monitoring Requirements, by allowing exceedances of the permitted TPDES effluent limits (all maximum limitations) at Outfall 201A; PENALTY: $9,950; STAFF ATTORNEY: Courtney St. Julian, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Southwest Shipyard, L.P.; DOCKET NUMBER: 2005-0097-MLM-E; TCEQ ID NUMBER: RN100248749; LOCATION: 18310 Market Street, Channelview, Harris County, Texas; TYPE OF FACILITY: barge cleaning and repair; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the permitted effluent limits at Outfall 001 for the months of March, July, and October - December 2003, and January and February 2004; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the permitted effluent limits at Outfall 003; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the permitted effluent limits at Outfall 004 for the months of March, May, November, and December 2003, and February 2004; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the permitted effluent limits at Outfall 005; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the permitted effluent limits at Outfall 006; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit No. 02605, Effluent Limitations and Monitoring Requirements No. 1, by failing to comply with the Ammonia Nitrogen effluent limit of 6 milligrams per liter at Outfall 001; 30 TAC §122.143(4) and §122.145(2)(B), Federal Operating Permit No. O-1260, General Terms and Conditions, and THSC, §382.085(b), by failing to submit deviation reports for 2004 and for the first semiannual reporting period of 2005; 30 TAC §122.143(4) and §116.115(c), Federal Operating Permit No. O-1260, Special Condition No. 10, NSR Permit No. 9442, Special Condition No. 11D, and THSC, §382.085(b), by failing to install a continuous run time flow monitor to record average hourly values of flow and composition for Flares FL-1 and FL-3; 30 TAC §122.143(4) and §116.115(c), Federal Operating Permit No. O-1260, Special Condition No. 10, NSR Permit No. 36241, Special Condition No. 10C, and THSC, §382.085(b), by failing to record and develop an accurate monthly report for VOC emissions in pounds per hour (lbs/hr) on a daily basis for the Barge Rail Painting Facility; 30 TAC §122.143(4) and §116.115(c), Federal Operating Permit No. O-1260, Special Condition No. 10, NSR Permit No. 43774, Special Condition No. 16E, and THSC, §382.085(b), by failing to record and develop an accurate monthly report for VOC emissions in lbs/hr on a daily basis for Dry Docks DD1 and 2, and DD3STK; PENALTY: $49,686; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: The City of Pharr; DOCKET NUMBER: 2003-0357-PST-E; TCEQ ID NUMBER: RN101429413; LOCATION: 1000 South Bluebonnet Street, Pharr, Hidalgo County, Texas; TYPE OF FACILITY: petroleum storage tank facility; RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST system; 30 TAC §334.8(c)(4)(B) and TWC, §26.346(a), by failing to ensure that the UST registration and self-certification form was fully and accurately completed and submitted to the agency in a timely manner; 30 TAC §334.8(c)(5)(C), by failing to permanently tag, label, or mark the UST system with the identification number listed on the UST registration and self-certification form; 30 TAC §334.49(c)(4) and TWC, §26.3475(d), by failing to test the cathodic protection system within six months of installation, and by failing to have the cathodic protection system inspected once every three years thereafter by a corrosion specialist or corrosion technician; 30 TAC §334.49(c)(2)(C) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least every 60 days to ensure that the rectifier and other system components were operating properly; 30 TAC §334.10(b)(1)(A), by failing to develop and maintain all required records pertaining to the UST system; 30 TAC §334.50(d)(9)(A)(v), by failing to report to the agency a UST system analysis report result of inconclusive, which was not investigated and quantified as a pass within 72 hours of the time of receipt of the inconclusive analysis report result; 30 TAC §334.50(d)(1)(B)(i) and TWC, §26.3475(c)(1), by failing to conduct inventory control procedures in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory; 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to reconcile the inventory control records on a monthly basis in a manner sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; and 30 TAC §334.50(d)(1)(B)(iii)(III) and TWC, §26.3475(c)(1), by failing to meter and record substance dispensing within the local standards for meter calibration or within an accuracy of six cubic inches for every five gallons of product withdrawn; PENALTY: $22,750; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(12) COMPANY: YFZ Land, LLC; DOCKET NUMBER: 2006-0394-MLM-E; TCEQ ID NUMBER: RN104250626; LOCATION: on two contiguous tracts of property totaling 1,691 acres approximately four miles northeast of the intersection of United States Highway 277 and Rudd Road, north of Eldorado, Schleicher County, Texas; TYPE OF FACILITY: religious retreat; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to obtain a license before engaging in landscape irrigation activities; TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of wastewater from a wastewater holding tank; 30 TAC §330.5(a)(3), by failing to prevent an unauthorized discharge/disposal of process wastewater from a holding pond that collects commingled storm water and concrete batch plant process water; and 30 TAC §330.5(a)(3), by failing to prevent unauthorized discharge of a petroleum hydrocarbon; PENALTY: $4,503; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: San Angelo Regional Office,

622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

TRD-200604814
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 29, 2006

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Notice of Opportunity to Comment on Shut Down/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The Commission proposes a Default order in accordance with TWC, §7.075. This notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 9, 2006**. The commission will consider any written comments received and the commission may withdraw or withhold approval of an S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO are available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 9, 2006**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Inara Convenience, Inc. dba Rosedale Texaco; DOCKET NUMBER: 2006-0123-PST-E; TCEQ ID NUMBER: RN101534790; LOCATION: 6101 East Rosedale, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b), (b)(1)(A), (b)(2) and (b)(2)(A)(i)(III), and Texas Water Code, §26.3475(a) and (c)(1); 30 TAC §334.48(c) and Agreed Order Docket Number 2003-1588-PST-E, Ordering Provision Number 2.a., by failing to conduct effective manual or automatic inventory control procedures for all underground storage tanks (USTs) involved in the retail sale of petroleum substances used as a motor fuel; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number was permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube according to the UST registration and self-certification form; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200604816
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 29, 2006

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 19 and to the State Implementation Plan

The Texas Commission on Environmental Quality will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 19, Electronic Reporting, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning state implementation plans (SIPs).

The proposed rulemaking would outline the electronic reporting requirements for federally authorized programs and certain state regulatory programs. The EPA promulgated its Cross Media Electronic Reporting Rule (CROMERR) on October 13, 2005, which impacts the Texas Commission on Environmental Quality's federally authorized programs by requiring specific regulatory changes in order for the commission to accept reports and applications electronically. The proposed rule will not mandate electronic reporting. Affected entities will have the option to utilize the electronic reporting alternative. Adding a chapter for electronic reporting will minimize the need to open multiple rule sections now or in the future in the event EPA amends CROMERR. This rule also will establish that a person who fails to comply with electronic reporting procedures will be subject to the same level of enforcement as for failure to report as required.

A public hearing on this proposal will be held in Austin on October 3, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality located at 12100 Park 35 Circle in Building F, Room 2210. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Holly Vierk, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

Written comments may be submitted to Holly Vierk, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www.5.tceq.state.tx.us.rules/ecomments/*. All comments should reference Rule Project Number 2006-018-019-PR. The comment period closes October 9, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Ellette Vinyard, Permitting and Remediation Support, at (512) 239-6085.

TRD-200604725
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 25, 2006

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 116 and 321 and the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, and Chapter 321, Control of Certain Activities by Rule, and to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The commission proposes amendments to §§116.110, 116.116, 116.615, 116.710, 116.721, 116.787, 116.805, 116.820, 116.930, 116.1020, 116.1021, 116.1424, and 321.43. The proposed amendments to Chapter 116 will be submitted as a revision to the state implementation plan. The proposed rulemaking would implement statutory requirements of Senate Bill 1740, 79th Legislature, 2005, concerning construction of facilities prior to the issuance of a permit, and concerning distance limits, setbacks, and buffer zones specified in air quality standard permits.

A public hearing on this proposal will be held in Austin, Texas, on October 2, 2006, at 2:00 p.m., in Building B, Room 201A, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. The comment period closes October 9, 2006. All comments should reference Rule Project Number 2005-052-116-PR. The proposed rules may be viewed on the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

TRD-200604738
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 25, 2006

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Notice of Request for Public Comment and Notice of a Public Meeting for a Total Maximum Daily Load

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment three draft Total Maximum Daily Loads (TMDL) for chloride, sulfate, and total dissolved solids in Petronila Creek Above Tidal (Segment 2204) located in Nueces and Kleberg Counties in South Texas. The TCEQ will conduct a public meeting to receive comments on the draft TMDL. This announcement also constitutes notice that the TMDL will become part of the State Water Quality Management Plan upon approval by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies included in the state of Texas Clean Water Act, §303(d) list of impaired water bodies. A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting on the draft TMDLs for chloride, sulfate, and total dissolved solids in Petronila Creek Above Tidal, located in the Nueces-Rio Grande Coastal Basin. The purpose of the public meeting is to provide the public an opportunity to comment on the draft TMDLs. The commission requests comment on each of the six major components of the TMDL: problem definition, endpoint identification, source analysis, linkage between sources and receiving waters, margin of safety, and pollutant loading allocation. After the public comment period, TCEQ staff may revise the TMDLs, if appropriate. The final TMDLs will then be considered by the commission for adoption. Upon adoption of the TMDLs by the commission, the final TMDLs and a response to all comments will be made available on the TCEQ Web site referenced in this notice. The TMDLs will then be submitted to EPA Region 6 for approval. Upon approval, the TMDLs will be certified as an update to the State of Texas Water Quality Management Plan.

A public meeting will be held on September 20, 2006, at 7:00 p.m., at the Johnny S. Calderon Building, 710 East Main Street, Robstown, Texas. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the meeting; however, an agency staff member will be available to discuss the matter 30 minutes prior to the meeting and will answer questions before and after the meeting.

Written comments should be submitted to Kerry Niemann, TCEQ Water Programs Division, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. All comments must be received by 5:00 p.m., October 9, 2006, and should reference, Three Total Maximum Daily Loads for Chloride, Sulfate, and Total Dissolved Solids in Petronila Creek Above Tidal, For Segment Number 2204. For further information regarding the draft TMDLs, please contact Kerry Niemann, Water Programs Division, at (512) 239-0483 or *kniemann@tceq.state.tx.us*. Copies of the draft TMDL document can be obtained via the commission's Web site at *http://www.tceq.state.tx.us/implementation/water/tmd/index.html*, or by calling (512) 239-4900.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the commission at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200604813
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 29, 2006

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Notice of Water Quality Applications

The following notices were issued during the period of August 24, 2006.

The following require the applicants to publish notice in the newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INTERCONTINENTAL TERMINALS COMPANY which operates a centralized waste treatment facility and a petroleum and chemical for-hire bulk terminal facility, has applied for a major amendment to TPDES Permit No. WQ0001984000 to authorize the discharge of hydrostatic test waters from cleaned chemical tank systems via Outfalls 001, 003, 004, 005, 006, 008, and 009; apply centralized waste treatment facility guidelines at Outfall 002; and change the sampling point for discharges via Outfall 008. The current permit authorizes the discharge of storm water from tank farm areas on an intermittent and flow variable basis via Outfalls 001, 003, 004, 005, 006, 008, and 009; treated industrial wastewater at a daily average flow not to exceed 273,000 gallons per day via Outfall 002; and ballast water at a daily average flow not to exceed 50,000 gallons per day via Outfall 007. The facility is located at 1943 Battleground Road, just north of the intersection of Miller Cutoff Road and State Highway 134, in the City of Deer Park, Harris County, Texas.

MUNSON PARK MANAGEMENT, LLC has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, Proposed Permit No. WQ0014651001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 49,000 gallons per day via public access drip irrigation system with mulch cover with a minimum area of 490,000 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site will be located immediately south of the southern terminus of Loop Court, 2,800 feet northwest of the intersection of State Highway 360 and State Highway 2244 in Travis County, Texas.

CITY OF POINT has applied for a renewal of TPDES Permit No. 10964-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 2,100 feet east of the intersection of Farm-to-Market Road 47 and U.S. Highway 69 in the City of Point in Rains County, Texas.

CITY OF POINT has applied for a renewal of TPDES Permit No. 10964-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located on Industrial Boulevard approximately 1,500 feet west of the intersection of Farm-to-Market Road 514 and U.S. Highway 69 in Rains County, Texas.

WILLIAMSBURG REGIONAL SEWAGE AUTHORITY has applied for a major amendment to TPDES Permit No. 11598-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 2,000,000 gallons per day to an annual average flow not to exceed 3,000,000 gallons per day. The facility is located at 22823 Franz Road, approximately 5,000 feet west and 5,600 feet north of the intersection of Interstate Highway 10 and Mason Road in Harris County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200604897
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 30, 2006

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Notice of Water Rights Application

Notice issued August 25, 2006

APPLICATION NO. 5789A; The Lakeside Club, P.O. Box 40173, Houston, Texas 77240, applicant, has applied to amend Water Use Permit No. 5789 to increase the maximum diversion rate from White Oak Bayou, San Jacinto River Basin Harris County and amend special condition 5b. The application was received on May 9, 2006 and additional information and fees were received on June 28, 2006. The application was accepted for filing and declared administratively complete on July 26, 2006. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ

can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200604895
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 30, 2006

♦ ♦ ♦

Office of the Governor

Request for Proposals

The Office of the Governor (OOG) is accepting proposals for nomination by the governor to compete for funding from the U.S. Environmental Protection Agency (EPA) Targeted Watershed Grants Program.

Approximately $7.1 million to about $16 million (these totals represent combining a portion of both 2006 and anticipated 2007 Targeted Watersheds Grant funds) will be available to support projects nationwide. The total amount to be awarded under this announcement will depend upon the FY 2007 funds and the quality of proposals received. EPA anticipates that typical Grants awards for the selected watersheds will range from $600,000 to $900,000. EPA is requiring applicants to demonstrate a minimum non-federal match of 25% of the total budget of the project. In addition to cash, matching funds can come from in-kind contributions, such as the use of volunteers and/or donated time, equipment, expertise, etc., consistent with the regulations governing matching fund requirements (40 CFR 31.24 or 40 CFR 30.23).

Proposals for nomination submitted to the OOG should respond to and be in conformity with the guidelines and priorities outlined in the EPA Targeted Watershed Grants Program notice published in the August 15, 2006 issue of the Federal Register volume 71, number 157, page 46901 - 46911. This notice can be found on the EPA website: http://www.epa.gov/fedrgstr/EPA-WATER/2006/August/Day-15/w6898.htm.

In addition to the projects located exclusively in Texas nominated by the OOG, an unlimited number of inter-state or joint state and tribal watershed projects may be nominated. It is the responsibility of inter-state or joint state and tribal project administrators to submit applications to the appropriate state and tribal entities.

Application submittal: One electronic copy and five complete paper copies of each proposal must be received by 5 p.m. October 9, 2006.

Electronic. Please send an electronic copy of only the title page, abstract, work plan description, and budget form to demetria.fairley@governor.state.tx.us. Electronic submissions are limited to 120 KB in size and one submission per applicant. Do not send maps, letters of support, match certifications, or pictures of any kind via the electronic mailbox. The subject line must be in the format "STATE--Watershed Name" (e.g., TX--Rock Creek). No confidential business information should be sent via e-mail. The deadline for all electronic submissions is 5 p.m. October 9, 2006. If unusual or extraordinary circumstances prevent electronic submission of the proposal, please contact Demetria Fairley at (512) 305-9068.

Paper. Five hard copies of the complete proposal (including attachments, support letters, match commitments, etc.) must be received by 5 p.m. October 6, 2006. Submissions by conventional mail delivery should be sent to: State Grants Team, Office of the Governor, P.O. Box 12428, Austin, Texas 78711, ATTN: Demetria Fairley, Targeted Watershed Grants Program. Submissions by courier should be sent to State Grants Team, Office of the Governor, State Insurance Bldg., 1100 San Jacinto, Austin, Texas 78701, ATTN: Demetria Fairley, Targeted Watershed Grants Program. Contact phone: (512) 305-9068.

This Request for Proposals is the only written document containing application instructions available to applicants from the OOG. Information contained in proposals should comply with relevant sections from the above referenced Federal Register notice issued by EPA. Only those nominees selected by EPA for awards will be required to submit a formal grant application directly to EPA.

Contact information: Office of the Governor: Demetria Fairley, (512) 305-9068, demetria.fairley@governor.state.tx.us; EPA Region VI: Brad Lamb, (214) 665-6683, lamb.brad@epamail.epa.gov.

TRD-200604806
Katherine Knight
Assistant General Counsel
Office of the Governor
Filed: August 29, 2006

♦ ♦ ♦

Department of State Health Services

Notice of Intent to Engage in Negotiated Rulemaking

DSHS intends to engage in negotiated rulemaking to develop an implementation plan, in the form of a rule, for the provider of last resort provisions of HB 2292, 78th Legislature, codified in Texas Health and Safety Code, §533.035. The subject of this negotiated rulemaking will involve an implementation plan that will operationalize the provisions of the law and the requirements of the Governor's Executive Order RP 45.

The provider of last resort provisions require that Local Mental Health Authorities make every reasonable attempt to solicit the development of an available and appropriate provider base sufficient to meet the needs of consumers in its area and determine whether or not there are willing providers of the relevant services in the service area or county. Executive Order RP 45 requires an implementation plan that ensures protection of consumer choice, protects the safety net, recognizes local differences and contains a timeline that is responsive to the need to ensure no disruption of existing services to consumers, the local community readiness, and the need for a safety net.

The scope of this negotiated rulemaking will include the development of an implementation plan. It will not include revisions to the existing scope of services required in the agency's performance contract with local mental health authorities.

From the convening process, DSHS has determined that:

-a diverse, but limited, set of stakeholders exists who will be affected by the subject matter of this rule;

-stakeholders have a high degree of interest in having a fair and balanced group negotiate a rule that includes an implementation plan for continuing the implementation of the provider of last resort provisions;

-stakeholders have both diverse and common interests which are suitable for negotiation;

-stakeholders have something to gain by participating in the process and non-participation would likely result in negative and significant consequences;

-reaching consensus on most aspects of this rule appears possible; however, there will be some areas that will involve tough compromise on the part of all affected parties;

-the unprecedented opportunity exists for stakeholders to share information, communicate their interests and have the chance to have their

data and assumptions questioned by others who have their own perspectives and data; and

-the agency stands to gain important information about how its stakeholders view the issues involved in this rule and criteria the agency can use to determine compliance with the provider of last resort provisions.

A preliminary list of issues to be negotiated include:

1. Ground Rules

2. Definitions

3. Provider Solicitation Guidelines

4. Local Decision-making

5. Criteria for Community Mental Health Centers that provide services

6. Evaluation

There is a diverse but limited set of stakeholders who are significantly affected by this rule and will be represented on the negotiating committee. They include:

-consumers of mental health services and their families;

-advocates for consumers and families;

-interested parties who do not have a personal stake in the outcome of the rule;

-designated local mental health authorities;

-private providers of mental health services;

-county judges and county commissioners, from both rural and urban counties, that are the appointing authorities for Community Mental Health Center boards of directors; and

-the state agency that is required to regulate and provide oversight for public mental health services provided to Texans who are eligible.

DSHS proposes to appoint the following individuals to the negotiating committee to represent the agency and affected parties:

-consumers of mental health services and their families

--Carley Scales, Consumer

--Richard Hansen, Consumer

--Valerie Garza, Family member

--Monica Thyssen, Family member

-advocates for consumers and families

--Aaryce Hayes, Advocacy, Inc.

--Robin Peyson, NAMI Texas

-interested parties who do not have a personal stake in the outcome of the rule

--Linda Frost, Hogg Foundation

-designated Local Mental Health Authorities

--Sandy Skelton, Texas Council of MHMR Centers

--Cindy Sill, Tri-County MHMR Services

-private providers of mental health services

--Richard Wallace, Providence of Texas

--Beth Epps, Adapt of America, Inc.

-county judges and county commissioners, from both rural and urban counties, who are the appointing authorities for CMHC boards of directors;

--Judge Van Lee York, Borden County, Association of County Judges and County Commissioners

--Donald Lee, Conference of Urban Counties

-the state agency that is required to regulate and provide oversight for public mental health services provided to Texans who are eligible.

--Randy Fritz

DSHS has attempted to identify all significantly affected parties and include at least one person to represent each party on the negotiated rulemaking committee. Meetings will be open to the public. If there are persons who are significantly affected by this proposed rule and not represented by the persons named above, those persons may apply to the agency for membership on the negotiating committee or nominate another to represent their interests. Application for membership must be made in writing and include the following information:

-Name and contact information of the person submitting the application;

-Description of how the person is significantly affected by the rule;

-Name and contact information of the person being nominated for membership;

-Description of the qualifications of the nominee to represent the person's interests.

DSHS requests comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee. Comments and applications for membership on the negotiating committee must be submitted by September 18, 2006, to: Sam Shore, DSHS, 1100 West 49th Street, Austin, TX 78756 or sam.shore@dshs.state.tx.us, fax (512) 458-7507.

TRD-200604894
Cathy Campbell
General Counsel
Department of State Health Services
Filed: August 30, 2006

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Amendment Number 747, Transmittal Number TX 06-029, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The amendment is effective September 8, 2006.

Amendment 747 revises the methodology used by the State to estimate the Medicaid Upper Payment Limit (UPL) for hospital inpatient services. The UPL is the federal limit on Medicaid payments to a group of hospitals and is determined under Federal regulations as a reasonable estimate of the amount that would be paid for the Medicaid services or similar services using Medicare payment principles. The federal regulation, 42 C.F.R. §447.272, provides that aggregate Medicaid payments to each group of hospitals (defined as State-owned hospitals, non-State government-owned hospitals, and privately-owned hospitals) may not exceed a reasonable estimate of the amount that would be paid to the group of hospitals for the Medicaid services or similar services under Medicare payment principles. Amendment 747 changes the method used to calculate this aggregate UPL for the three classes of hospitals.

This amendment is not expected to have an impact on State expenditures or the amount of federal matching funds to the State.

To obtain copies of the proposed amendment, interested parties may contact Arnulfo Gomez by telephone at (512) 491-1166 or by e-mail at arnulfo.gomez@hhsc.state.tx.us.

TRD-200604886
Wendy Pellow
Assistant General Counsel
Texas Health and Human Services Commission
Filed: August 30, 2006

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Texas Department of Insurance

Company Licensing

Application to change the name of TANK OWNERS MUTUAL INSURANCE COMPANY to TANK OWNER MEMBERS INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Fort Worth, Texas.

Application for admission to the State of Texas by ECHELON PROPERTY & CASUALTY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Chicago, Illinois.

Application for incorporation to the State of Texas by ATLANTIC MERIDIAN REINSURANCE COMPANY, LTD., a domestic fire and/or casualty company. The home office is in Addison, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200604888
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 30, 2006

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Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2656 on September 20, 2006 at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, in Austin, Texas, to consider a proposal by the Texas Windstorm Insurance Association (TWIA) seeking an upward modification to the five percent surcharge applicable to TWIA policies of windstorm and hail insurance that are issued on residential structures that qualify under TWIA regulations that specify eligibility criteria for structures to be approved for insurability without an inspection. TWIA has requested approval of an increase in the surcharge from the current five percent to 25 percent.

Pursuant to the Insurance Code Article 21.49 §6A(a), to be considered insurable property by the TWIA, the property must be inspected or approved by the Commissioner for compliance with the TWIA plan of operation. The regulations, which are approved pursuant to the plan of operation, are necessary to provide an approval process to provide wind and hail coverage that may be otherwise unavailable to residential structures currently insured in the voluntary market that do not have a certificate of compliance as evidence of insurability as required by the TWIA.

The Insurance Code Article 21.49 §8(a) requires TWIA to file with the Commissioner every manual of classifications, rules, rates which shall include condition charges, every rating plan, and every modification of any of the foregoing which it proposes to use.

The hearing is held pursuant to the Insurance Code Article 21.49 §5A and §8(a). Article 21.49 §5A provides that the Commissioner, after notice and hearing, may issue any orders considered necessary to carry out the purposes of the Texas Windstorm Insurance Association Act, including but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear to testify for or against the approval of the proposed increase in the surcharge for residential policies as specified in this proposal.

A copy of TWIA's surcharge filing is available for review in the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. To request a copy of the surcharge filing, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-0806-11).

TRD-200604665
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 23, 2006

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2654, on September 20, 2006, at 10:00 a.m. in room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, to consider the appointment of a representative of the general public to the Board of Directors of the Texas Windstorm Insurance Association (TWIA). Georgia Rutherford Neblett, a TWIA policyholder and a resident of Port Aransas, Texas has been nominated by the Office of Public Insurance Counsel for appointment to the Board of Directors as one of the two representatives of the general public to serve on the TWIA Board.

The hearing is held pursuant to Texas Insurance Code Article 21.49 §5A, which provides that the Commissioner after notice and hearing may issue any orders considered necessary to carry out the purposes of Article 21.49 (Texas Windstorm Insurance Association Act), including but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear and testify for or against the proposed appointment.

Texas Insurance Code Article 21.49 §5(g) provides that the TWIA Board of Directors shall be composed of nine members. Article 21.49 §5(g)(2) provides that two of the TWIA board members shall be nominated by the Office of Public Insurance Counsel to be representatives of the general public. Such nominees must as of the date of appointment reside in a catastrophe area and be policyholders of TWIA. Article 21.49 §5(h) provides that members of the TWIA Board of Directors serve three-year staggered terms with the terms of three members expiring on the third Tuesday in March of each year.

Any questions concerning this matter should be addressed to Marilyn Hamilton, Associate Commissioner, Personal and Commercial Lines Division, MC 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

TRD-200604666
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 23, 2006

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Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2655 on September 20, 2006 at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, in Austin, Texas, to consider a proposal by the Texas Windstorm Insurance Association (TWIA) requesting approval of a change in the structure of commercial deductibles from a default 0.5 percent per item per occurrence deductible with optional flat deductibles in amounts ranging from $1,000 to $75,000 to a default deductible of 1 percent per item per occurrence and optional percentage deductibles of 2 percent and 5 percent per item per occurrence, eliminating optional flat deductibles.

The Insurance Code Article 21.49 §8(a) requires TWIA to file with the Commissioner every manual of classifications, rules, rates which shall include condition charges, every rating plan, and every modification of any of the foregoing which it proposes to use.

The hearing is held pursuant to the Insurance Code Article 21.49 §5A and §8(a). Article 21.49 §5A provides that the Commissioner, after notice and hearing, may issue any orders considered necessary to carry out the purposes of the Texas Windstorm Insurance Association Act, including but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear to testify for or against the adoption of the proposal to change the structure of the TWIA commercial deductibles.

A copy of the TWIA commercial deductible filing is available for review in the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. To request a copy of the commercial deductible filing, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-0806-12).

TRD-200604667
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 23, 2006

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Notice of Public Hearing

Commissioner's Docket Number 2657 to receive information concerning the application for Conversion to a Stock Company of American Physicians Insurance Exchange.

This is formal notice that an information public hearing will be held before Commissioner Mike Geeslin, or his designee, on Wednesday, September 13, 2006 at 10:00 am in Room 100 of the William P. Hobby Jr., State Office Bldg. 333 Guadalupe, Austin, Texas 78701. Unless otherwise directed by the Commissioner, the hearing shall be continued from day to day in Room 100 at the Texas Department of Insurance until concluded.

The purpose of the hearing is to receive information concerning the application for conversion to a stock company by American Physicians Insurance Exchange and to consider the fairness of the proposed conversion.

Authority, Jurisdiction and Statutes and Rules Involved

The Commissioner has jurisdiction and legal authority over the subject matter of the hearing pursuant to the Texas Insurance Code Annotated §31.021, Chapter 942 and Chapter 826.

Matter to be Considered

The Commissioner will consider the testimony presented and information filed by interested parties and the applicant. Interested persons may present either oral or written comments on the conversion and the fairness of the conversion at the hearing.

Pursuant to the Texas Insurance Code Annotated, §826.101 it is the responsibility of the applicant to demonstrate why the Commissioner of Insurance should approve the application; therefore, it is advised that the applicant bring competent witnesses to the hearing. Applicant should be prepared to respond to any unresolved questions raised by TDI, its representatives, or the general public. Applicant should be prepared to present sufficient information to demonstrate the fairness of the proposal at the hearing as ordinarily there will be no recess given in order to secure additional evidence.

Written comments on the application for acquisition of control and the fairness of the proposed conversion may be submitted no later than September 12, 2006 to the Office of the Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Kevin Brady Financial Program, P.O. Box 149104, MC 305-2A, Austin, Texas 78714-9104. Also written and oral comments may be presented at the hearing.

Requests for information related to the application should be directed to Kevin Brady, Financial Division, (512) 322-5040.

TRD-200604669
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 24, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of MORGAN ADJUSTING SERVICES, INC., a domestic third party administrator. The home office is HICO, TEXAS.

Application for admission to Texas of TSA CONSULTING GROUP, INC., a foreign third party administrator. The home office is FORT WALTON BEACH, FLORIDA.

Application to change the name of WISENBERG, POZMANTIER & CO., INC., to ACORDIA OF TEXAS, INC., a domestic third party administrator. The home office is HOUSTON, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200604662
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 23, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of BUTTERWORTH & MACIAS, P.C., a domestic third party administrator. The home office is EL PASO, TEXAS.

Application for admission to Texas of SOUTHWEST SERVICE ADMINISTRATORS, INC., a foreign third party administrator. The home office is PHOENIX, ARIZONA.

Application for name change of WORLD ACCESS SERVICE CORP. to WORLD ACCESS SERVICE CORP. (using the assumed name of ACCESS AMERICA), a foreign third party administrator. The home office is RICHMOND, VIRGINIA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200604889
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 30, 2006

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Texas Lottery Commission

Instant Game Number 662 "World Series of Poker"

1.0 Name and Style of Game.

A. The name of Instant Game No. 662 is "WORLD SERIES OF POKER TEXAS HOLD 'EM". The play style is "cards".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 662 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 662.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 2 SPADE SYMBOL, 3 SPADE SYMBOL, 4 SPADE SYMBOL, 5 SPADE SYMBOL, 6 SPADE SYMBOL, 7 SPADE SYMBOL, 8 SPADE SYMBOL, 9 SPADE SYMBOL, 10 SPADE SYMBOL, J SPADE SYMBOL, Q SPADE SYMBOL, K SPADE SYMBOL, A SPADE SYMBOL, 2 CLUB SYMBOL, 3 CLUB SYMBOL, 4 CLUB SYMBOL, 5 CLUB SYMBOL, 6 CLUB SYMBOL, 7 CLUB SYMBOL, 8 CLUB SYMBOL, 9 CLUB SYMBOL, 10 CLUB SYMBOL, J CLUB SYMBOL, Q CLUB SYMBOL, K CLUB SYMBOL, A CLUB SYMBOL, $2.00, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $75.00, $100, $250, $500, $5,000, $100,000, MERCH and WSOP. The possible red play symbols are: 2 DIAMOND SYMBOL, 3 DIAMOND SYMBOL, 4 DIAMOND SYMBOL, 5 DIAMOND SYMBOL, 6 DIAMOND SYMBOL, 7 DIAMOND SYMBOL, 8 DIAMOND SYMBOL, 9 DIAMOND SYMBOL, 10 DIAMOND SYMBOL, J DIAMOND SYMBOL, Q DIAMOND SYMBOL, K DIAMOND SYMBOL, A DIAMOND SYMBOL, 2 HEART SYMBOL, 3 HEART SYMBOL, 4 HEART SYMBOL, 5 HEART SYMBOL, 6 HEART SYMBOL, 7 HEART SYMBOL, 8 HEART SYMBOL, 9 HEART SYMBOL, 10 HEART SYMBOL, J HEART SYMBOL, Q HEART SYMBOL, K HEART SYMBOL and A HEART SYMBOL.

D. Play Symbol Caption--the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 662 - 1.2D

PLAY SYMBOL	CAPTION
2 SPADE SYMBOL (black)	TWS
3 SPADE SYMBOL (black)	THS
4 SPADE SYMBOL (black)	FRS
5 SPADE SYMBOL (black)	FVS
6 SPADE SYMBOL (black)	SXS
7 SPADE SYMBOL (black)	SNS
8 SPADE SYMBOL (black)	ETS
9 SPADE SYMBOL (black)	NIS
10 SPADE SYMBOL (black)	TNS
J SPADE SYMBOL (black)	JKS
Q SPADE SYMBOL (black)	QNS
K SPADE SYMBOL (black)	KGS
A SPADE SYMBOL (black)	ACS
2 CLUB SYMBOL (black)	TWC
3 CLUB SYMBOL (black)	THC
4 CLUB SYMBOL (black)	FRC
5 CLUB SYMBOL (black)	FVC
6 CLUB SYMBOL (black)	SXC
7 CLUB SYMBOL (black)	SNC
8 CLUB SYMBOL (black)	ETC
9 CLUB SYMBOL (black)	NIC
10 CLUB SYMBOL (black)	TNC
J CLUB SYMBOL (black)	JKC
Q CLUB SYMBOL (black)	QNC
K CLUB SYMBOL (black)	KGC
A CLUB SYMBOL (black)	ACC
2 DIAMOND SYMBOL (red)	TWD
3 DIAMOND SYMBOL (red)	THD
4 DIAMOND SYMBOL (red)	FRD
5 DIAMOND SYMBOL(red)	FVD
6 DIAMOND SYMBOL (red)	SXD
7 DIAMOND SYMBOL (red)	SND
8 DIAMOND SYMBOL (red)	ETD
9 DIAMOND SYMBOL (red)	NID
10 DIAMOND SYMBOL (red)	TND
J DIAMOND SYMBOL (red)	JKD
Q DIAMOND SYMBOL (red)	QND
K DIAMOND SYMBOL (red)	KGD
A DIAMOND SYMBOL (red)	ACD
2 HEART SYMBOL (red)	TWH
3 HEART SYMBOL (red)	THH
4 HEART SYMBOL (red)	FRH
5 HEART SYMBOL (red)	FVH
6 HEART SYMBOL (red)	SXH
7 HEART SYMBOL (red)	SNH
8 HEART SYMBOL (red)	ETH

9 HEART SYMBOL (red)	NIH
10 HEART SYMBOL (red)	TNH
J HEART SYMBOL (red)	JKH
Q HEART SYMBOL (red)	QNH
K HEART SYMBOL (red)	KGH
A HEART SYMBOL (red)	ACH
$2.00 (black)	TWO$
$5.00 (black)	FIVE$
$10.00 (black)	TEN$
$15.00 (black)	FIFTN
$20.00 (black)	TWENTY
$25.00 (black)	TWY FIV
$50.00 (black)	FIFTY
$75.00 (black)	SVY FIV
$100 (black)	ONE HUND
$250 (black)	TWO FTY
$500 (black)	FIV HUND
$5,000 (black)	FIV THOU
$100,000 (black)	100 THOU
MERCH (black)	PACK
WSOP (black)	TRIP

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 662 - 1.2E

CODE	PRIZE
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $10.00, $15.00 or $20.00.

H. Mid-Tier Prize--A prize of $25.00, $50.00, $75.00, $100, $250 or $500.

I. High-Tier Prize--A prize of PACK, TRIP or $100,000.

J. Bar Code--A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack--Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (662), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 662-0000001-001.

L. Pack--A pack of "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game tickets contains 50 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 050 will be exposed on one side of the pack and ticket front 001 on the other side.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game No. 662 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game is determined once the latex on the ticket is scratched off to expose 50 (fifty) Play Symbols. At each table, use YOUR 2 CARDS and the Community Cards to make your best 5-card poker hand. Do the same with THEIR 2 CARDS. If YOUR best 5-card poker hand beats THEIR best 5-card poker hand at the same TABLE, win the prize for that table. Each TABLE uses one 52-card deck. There are NO Wild Cards. Each TABLE played separately. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 50 (fifty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 50 (fifty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 50 (fifty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 50 (fifty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical "spot for spot" play data.

B. No duplicate non-winning prize symbols on a ticket.

C. A ticket may only win once in each table for a total of five possible wins on a ticket.

D. No duplicate tables, in any order, on any ticket.

E. Each table on a ticket will use a deck of fifty-two (52) cards.

F. Listed below is a Glossary of Terms for use in the patterns to follow:

"Starting Hand"--The two (2) cards underneath the scratch-off coating marked "YOUR 2 CARDS," or underneath the Scratch-off coating marked "THEIR 2 CARDS".

"Table"--Any of the five (5) play areas on each ticket.

"Board"--The five (5) cards underneath the scratch-off coating marked "COMMUNITY CARDS".

"Suit"--The Spades, Hearts, Diamonds and Clubs are the four (4) Suits.

"Suited"--Any amount of cards where each card is of the same Suit (for example, 4 of Hearts + 5 of Hearts).

"Non-suited"--Any amount of cards where at least one is of a different suit (for example, 4 of Hearts + 5 of Spades).

"Sequential"--Any amount of cards that are connected (for example, 10 of Hearts; Jack of Hearts; Queen of Diamonds; King of Clubs; Ace of Spades).

"Non-Sequential"--Any amount of cards that are not connected (for example, Ace of Hearts + Queen of Diamonds).

"Pair"--Two (2) cards of the exact same rank (for example, Ace of Diamonds + Ace of Spades or 7 of Hearts + 7 of Clubs).

"Three of a Kind"--Three (3) cards of the exact same rank.

"Straight"--Five (5) non-suited cards in sequential order (for example, 2 of Clubs; 3 of Hearts; 4 of Diamonds; 5 of Spades; 6 of Diamonds).

"Flush"--Five (5) non-sequential cards of the same suit (for example, 2 of Diamonds; 4 of Diamonds; 5 of Diamonds; Jack of Diamonds; King of Diamonds).

"Full House"--Three (3) of a kind with a pair (for example, 4 of Diamonds; 4 of Clubs; 4 of Spades; 9 of Hearts; 9 of Diamonds).

"Four of a Kind"--Four (4) cards of the exact same rank.

"Straight Flush"--Five (5) suited and sequential cards, EXCEPT the highest five (5) sequential cards.

"Royal Flush"--The highest five (5) suited and sequential cards (for example, 10 of Diamonds; Jack of Diamonds; Queen of Diamonds; King of Diamonds; Ace of Diamonds).

"Final Hand"--The highest ranking five-card hand that uses the two (2) cards in either STARTING HAND with the five (5) cards on the Board.

G. The Suit or Suits used in one of the Starting Hands will NEVER match any of the Suit or Suits in the other Starting Hand for that table.

H. In any table, the two (2) starting Hands will never be of the same rank (for example, Jack of Hearts + 10 of Hearts vs. Jack of Diamonds + 10 of Clubs or 4 of Clubs + 4 of Diamonds vs. 4 of Hearts + 4 of Spades.

I. Each and every Starting Hand (YOUR 2 CARDS or THEIR 2 CARDS) will come from one of the following groups:

A. Any Pair

B. Any Suited and Sequential two (2) cards

C. Any Non-Suited and Sequential or any Non-Suited and Non-Sequential Cards where BOTH cards are either a 10, Jack, Queen, King or Ace

J. No Board will ever contain a Straight, Flush, Full House, Four of a Kind, Straight Flush or Royal Flush.

K. No Board will ever contain four (4) cards of the same suit.

L. Every Straight or Straight Flush will use the card ranks below. An Ace will never be used in a Straight or Straight Flush.

2, 3, 4, 5, 6

3, 4, 5, 6, 7

4, 5, 6, 7, 8

5, 6, 7, 8, 9

6, 7, 8, 9, 10

7, 8, 9, 10, Jack

8, 9, 10, Jack, Queen

9, 10, Jack, Queen, King

M. A Straight will never appear in the same table with a Straight Flush or a Royal Flush.

2.3 Procedure for Claiming Prizes.

A. To claim a "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game prize of $10.00, $15.00, $20.00, $25.00, $50.00, $75.00, $100, $250 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $25.00, 50.00, $75.00, $100, $250 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game prize of PACK, TRIP, $5,000 or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "WORLD

SERIES OF POKER TEXAS HOLD 'EM" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "WORLD SERIES OF POKER TEXAS HOLD 'EM" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 662. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 662 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$10	652,800	6.25
$15	326,400	12.50
$20	163,200	25.00
$25	81,600	50.00
$50	81,600	50.00
$75	26,690	152.87
$100	7,480	545.45
$250	3,230	1,263.16
$500	1,530	2,666.67
PACK	4,840	842.98
TRIP	6	680,000.00
$5,000	68	60,000.00
$100,000	4	1,020,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.02. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 662 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 662, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200604882

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 30, 2006

♦ ♦ ♦

Instant Game Number 742 "$1,000,000 Mega Bucks"

1.0 Name and Style of Game.

A. The name of Instant Game No. 742 is "$1,000,000 MEGA BUCKS". The play style is for the game SLOTS is "key symbol match". The play style for game DICE is "add up with doubler". The play style for game CHIPS is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 742 shall be $20.00 per ticket.

1.2 Definitions in Instant Game No. 742.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 7 SYMBOL, GOLD BAR SYMBOL, HORSE SHOE SYMBOL, BELL SYMBOL, DOLLAR SIGN SYMBOL, POT OF GOLD SYMBOL, STAR SYMBOL, DIAMOND SYMBOL, GRAPES SYMBOL, LEMON SYMBOL, CHERRY SYMBOL, BOOT SYMBOL, HAT SYMBOL, SADDLE SYMBOL, SPUR SYMBOL, HORSE SYMBOL, 1 DICE SYMBOL, 2 DICE SYMBOL, 3 DICE SYMBOL, 4 DICE SYMBOL, 5 DICE SYMBOL, 6 DICE SYMBOL, 1 COIN SYMBOL, 2 COIN SYMBOL, 3 COIN SYMBOL, 4 COIN SYMBOL, 5 COIN SYMBOL, 6 COIN SYMBOL, 7 COIN SYMBOL, 8 COIN SYMBOL, 9 COIN SYMBOL, 10 COIN SYMBOL, 11 COIN SYMBOL, 12 COIN SYMBOL, 13 COIN SYMBOL, 14 COIN SYMBOL, 15 COIN SYMBOL, 16 COIN SYMBOL, 17 COIN SYMBOL, 18 COIN SYMBOL, 19 COIN SYMBOL, 20 COIN SYMBOL, $5.00, $10.00, $20.00, $25.00, $30.00, $40.00, $50.00, $100, $200, $500, $1,000, $2,000, $10,000, $20,000 and ONE MILL SYMBOL.

D. Play Symbol Caption--the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 742 - 1.2D

PLAY SYMBOL	CAPTION
7 SYMBOL	SEVN
GOLD BAR SYMBOL	GBAR
HORSE SHOE SYMBOL	SHOE
BELL SYMBOL	BELL
DOLLAR SIGN SYMBOL	DOLR
POT OF GOLD SYMBOL	GPOT
STAR SYMBOL	STAR
DIAMOND SYMBOL	DIAM
GRAPES SYMBOL	GRPS
LEMON SYMBOL	LEMN
CHERRY SYMBOL	CHRY
BOOT SYMBOL	BOOT
HAT SYMBOL	HAT
SADDLE SYMBOL	SADDLE
SPUR SYMBOL	SPUR
HORSE SYMBOL	HORSE
1 DICE SYMBOL	ONE
2 DICE SYMBOL	TWO
3 DICE SYMBOL	THR
4 DICE SYMBOL	FOR
5 DICE SYMBOL	FIV
6 DICE SYMBOL	SIX
1 COIN SYMBOL	ONE
2 COIN SYMBOL	TWO
3 COIN SYMBOL	THR
4 COIN SYMBOL	FOR
5 COIN SYMBOL	FIV
6 COIN SYMBOL	SIX
7 COIN SYMBOL	SVN
8 COIN SYMBOL	EGT
9 COIN SYMBOL	NIN
10 COIN SYMBOL	TEN
11 COIN SYMBOL	ELV
12 COIN SYMBOL	TLV
13 COIN SYMBOL	TRN
14 COIN SYMBOL	FTN
15 COIN SYMBOL	FFN
16 COIN SYMBOL	SXN
17 COIN SYMBOL	SVT
18 COIN SYMBOL	ETN
19 COIN SYMBOL	NTN
20 COIN SYMBOL	TWY
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$25.00	TWY FIV

$30.00	THIRTY
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$2,000	TWO THOU
$10,000	10 THOU
$20,000	20 THOU
$ONE MILL	ONE MILL

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 742 - 1.2E

CODE	PRIZE
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $20.00.

H. Mid-Tier Prize--A prize of $30.00, $40.00, $50.00, $100, $200 or $500.

I. High-Tier Prize--A prize of $1,000, $2,000, $10,000, $20,000 or $1,000,000.

J. Bar Code--A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 (thirteen) digit number consisting of the three (3) digit game number (742), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 742-0000001-001.

L. Pack--A pack of "$1,000,000 MEGA BUCKS" Instant Game tickets contains 50 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 001 and 050 will be exposed.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "$1,000,000 MEGA BUCKS" Instant Game No. 742 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "$1,000,000 MEGA BUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose 58 (fifty-eight) play symbols. For the game SLOTS, if a player reveals three (3) matching play symbols in the same SPIN across, the player wins the prize shown for that SPIN. For the game DICE, if a player's YOUR DICE play symbols total seven (7) in the same ROLL, the player wins the prize shown for that ROLL. If a player's YOUR DICE play symbol totals eleven (11) in the same ROLL, the player wins DOUBLE the prize shown for that ROLL. For the game CHIPS, if a player matches any of YOUR CHIPS play symbols to either WINNING CHIP play symbol, the player wins PRIZE shown for that chip. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 58 (fifty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 58 (fifty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 58 (fifty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 58 (fifty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Game Slots: No duplicate non-winning spins in any order.

C. Game Slots: No three matching non-winning symbols will appear in a vertical or diagonal line.

D. Game Slots: There will be many near wins (2 matching symbols) on non-winning tickets.

E. Game Dice: No duplicate non-winning rolls.

F. Game Dice: No duplicate non-winning prize symbols.

G. Game Chips: No duplicate non-winning play symbols.

H. Game Chips: No duplicate WINNING CHIPS.

I. Game Chips: No more than three duplicate non-winning prize symbols.

J. Game Chips: No prize amount in a non-winning spot will correspond with the YOUR CHIP play symbol (i.e. 5 and $5).

K. Game Chips: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

2.3 Procedure for Claiming Prizes.

A. To claim a "$1,000,000 MEGA BUCKS" Instant Game prize of $20.00, $30.00, $40.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $40.00, $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "$1,000,000 MEGA BUCKS" Instant Game prize of $1,000, $2,000, $10,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "$1,000,000 MEGA BUCKS" top level prize of $1,000,000, the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. As an alternative method of claiming a "$1,000,000 MEGA BUCKS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

G. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "$1,000,000 MEGA BUCKS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "$1,000,000 MEGA BUCKS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,000,000 tickets in the Instant Game No. 742. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 742 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$20	480,000	6.25
$30	180,000	16.67
$40	150,000	20.00
$50	120,000	25.00
$100	47,500	63.16
$200	10,500	285.71
$500	3,050	983.61
$1,000	625	4,800.00
$2,000	725	4,137.93
$10,000	175	17,142.86
$20,000	50	60,000.00
$1,000,000	3	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.02. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 742 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 742, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200604883
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 30, 2006

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Instant Game Number 745 "7-11-21"

1.0 Name and Style of Game.

A. The name of Instant Game No. 745 is "7-11-21". The play style is "add up".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 745 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 745.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 or $1,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 745 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 745 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

H. Mid-Tier Prize--A prize of $40.00 or $100.

I. High-Tier Prize--A prize of $1,000.

J. Bar Code--A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 (thirteen) digit number consisting of the three (3) digit game number (745), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 250 within each pack. The format will be: 745-0000001-001.

L. Pack--A pack of "7-11-21" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Ticket 001 to 005 will be on the top page; tickets 006 to 010 on the next page etc.; and tickets 246 to 250 will be on the last page with backs exposed. Tickets 001 will be folded over so the front of ticket 001 and 010 will be exposed.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "7-11-21" Instant Game No. 745 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "7-11-21" Instant Game is determined once the latex on the ticket is scratched off to expose 16 (sixteen) Play Symbols. The player adds up all three (3) of YOUR NUMBERS play symbols for each game across. If the total is 7, 11 or 21 in a single game, the player wins the PRIZE shown for that game. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 16 (sixteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 16 (sixteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 16 (sixteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 16 (sixteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols.

C. No duplicate non-winning games in any order.

D. Non-winning prize symbols will never be the same as a winning prize symbol.

E. No three numbers will total 7, 11 or 21 in the two possible diagonal positions.

2.3 Procedure for Claiming Prizes.

A. To claim a "7-11-21" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100 a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not,

in some cases, required to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "7-11-21" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "7-11-21" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "7-11-21" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "7-11-21" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,000,000 tickets in the Instant Game No. 745. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 745 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,392,000	8.62
$2	576,000	20.83
$4	336,000	35.71
$5	96,000	125.00
$10	48,000	250.00
$20	48,000	250.00
$40	24,000	500.00
$100	2,300	5,217.39
$1,000	200	60,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.76. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 745 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 745, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200604884
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 30, 2006

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Instant Game Number 754 "Holiday Grab Bag"

1.0 Name and Style of Game.

A. The name of Instant Game No. 754 is "HOLIDAY GRAB BAG". The play style is for Game 1 is "three in a line with doubler". The play style for Game 2 is "key number match with doubler". The play style for Game 3 is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 754 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 754.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, DOUBLE DOLLAR "$$" SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $500, $1,000, $5,000, $50,000, GIFT SYMBOL, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and STAR SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 754 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
DOUBLE DOLLAR "$$" SIGN SYMBOL	DBL
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIVTHO
$50,000	50 THOU
GIFT SYMBOL	GIFT
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
STAR SYMBOL	STAR

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 754 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (754), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 754-0000001-001.

L. Pack - A pack of "HOLIDAY GRAB BAG" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HOLIDAY GRAB BAG" Instant Game No. 754 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOLIDAY GRAB BAG" Instant Game is determined once the latex on the ticket is scratched off to expose 37 (thirty-seven) Play Symbols. For Game 1, if a player reveals three (3) matching numbers play symbols in any one row, column or diagonal, the player wins prize shown. If a player reveals two (2) matching numbers play symbols and a double dollar "$$" play symbol, the player wins DOUBLE the prize shown. For Game 2, if a player reveals three (3) matching amounts play symbols, the player wins that amount. If a player reveals two (2) matching amounts play symbols and a "GIFT" play symbol, the player wins DOUBLE that amount. For Game 3, if a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol, the player wins the prize shown for that number. If a player reveals a "STAR" play symbol, the player wins DOUBLE the prize shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 37 (thirty-seven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 37 (thirty-seven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 37 (thirty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 37 (thirty-seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The only game that may have more than one doubler occurrence on a ticket is GAME 3.

C. GAME 1: No five or more matching symbols in this game.

D. GAME 1: No more than one occurrence of three matching numbers in a row, column or diagonal.

E. GAME 1: No game will contain more than one incident of two matching numbers in a row, column or diagonal plus the "$$" doubler symbol.

F. GAME 2: No four or more matching play symbols.

G. GAME 2: No three or more pairs.

H. GAME 2: The doubler "GIFT" symbol will never appear in this game with three matching play symbols.

I. GAME 3: No duplicate non-winning prize symbols.

J. GAME 3: No duplicate non-winning YOUR NUMBERS play symbols.

K. GAME 3: No duplicate WINNING NUMBERS play symbols.

L. GAME 3: No prize amount in a non-winning spot will correspond with the YOUR NUMBER play symbol (i.e. 5 and $5).

M. GAME 3: Non-winning prize symbols will never be the same as a winning prize symbol.

N. GAME 3: The play symbols, with the exception of the "STAR" doubler play symbol, will be used an approximately equal number of times as the basis for a win.

O. GAME 3: WINNING NUMBER play positions will be used approximately evenly as the basis for a win.

P. GAME 3: The "STAR" doubler play symbol will only appear on intended winning tickets in conjunction with parameter B.

2.3 Procedure for Claiming Prizes.

A. To claim a "HOLIDAY GRAB BAG" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOLIDAY GRAB BAG" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOLIDAY GRAB BAG" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOLIDAY GRAB BAG" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOLIDAY GRAB BAG" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 754. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 754 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	880,000	6.82
$10	400,000	15.00
$15	160,000	37.50
$20	140,000	42.86
$50	80,000	75.00
$100	15,000	400.00
$500	1,200	5,000.00
$1,000	200	30,000.00
$5,000	30	200,000.00
$50,000	7	857,142.86

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.58. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 754 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 754, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200604722
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 25, 2006

♦ ♦ ♦

Instant Game Number 755 "Holiday Treasures"

1.0 Name and Style of Game.

A. The name of Instant Game No. 755 is "HOLIDAY TREASURES". The play style is "key symbol match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 755 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 755.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: TREE SYMBOL, JINGLE SYMBOL, HOLLY SYMBOL, SNOWMAN SYMBOL, BALL SYMBOL, SNOWFLAKE SYMBOL, EAR MUFF SYMBOL, CAP SYMBOL, DRUM SYMBOL, SACK SYMBOL, ANGEL SYMBOL, CANDY CANE SYMBOL, FIRE SYMBOL, COOKIE SYMBOL, LIGHT SYMBOL, MITTEN SYMBOL, WREATH SYMBOL, HORN SYMBOL, STOCKING SYMBOL, CANDLE SYMBOL, DEER SYMBOL, STAR SYMBOL, BELL SYMBOL, GIFT SYMBOL, MUSIC NOTE SYMBOL, BOOT SYMBOL, COAT SYMBOL, SHOVEL SYMBOL, SLED SYMBOL, $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $50.00, $100, $250, $500, $1,000 and $250,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 755 - 1.2D

PLAY SYMBOL	CAPTION
TREE SYMBOL	TREE
JINGLE SYMBOL	JINGLE
HOLLY SYMBOL	HOLLY
SNOWMAN SYMBOL	SNWMAN
BALL SYMBOL	BALL
SNOWFLAKE SYMBOL	SNOW
EAR MUFF SYMBOL	MUFFS
CAP SYMBOL	CAP
DRUM SYMBOL	DRUM
SACK SYMBOL	SACK
ANGEL SYMBOL	ANGEL
CANDY CANE SYMBOL	CANE
FIRE SYMBOL	FIRE
COOKIE SYMBOL	COOKIE
LIGHT SYMBOL	LIGHTS
MITTEN SYMBOL	MTTNS
WREATH SYMBOL	WREATH
HORN SYMBOL	HORN
STOCKING SYMBOL	STCKNG
CANDLE SYMBOL	CANDLE
DEER SYMBOL	DEER
STAR SYMBOL	STAR
BELL SYMBOL	BELLS
GIFT SYMBOL	GIFT
MUSIC NOTE SYMBOL	MUSIC
BOOT SYMBOL	BOOT
COAT SYMBOL	COAT
SHOVEL SYMBOL	SHOVEL
SLED SYMBOL	WIN $20
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$250	TWO FTY
$500	FIV HUND
$1,000	ONE THOU
$250,000	TFY THOU

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 755 - 1.2E

CODE	PRIZE
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $10.00 or $20.00.

H. Mid-Tier Prize--A prize of $50.00, $100 or $500.

I. High-Tier Prize--A prize of $1,000, $5,000 or $250,000.

J. Bar Code--A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 (thirteen) digit number consisting of the three (3) digit game number (755), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 755-0000001-001.

L. Pack--A pack of "HOLIDAY TREASURES" Instant Game tickets contains 50 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 025 while the other fold will show the back of ticket 001 and front of 025.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "HOLIDAY TREASURES" Instant Game No. 755 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOLIDAY TREASURES" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR SYMBOLS play symbols to any of the WINNING SYMBOLS play symbols, the player wins prize shown for that symbol. If a player reveals a "GIFT" play symbol, the player wins all 20 prizes shown instantly. If a player reveals a "SLEIGH" play symbol in the FAST $20 spot, the player wins $20 instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the

Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No more than three (3) identical non-winning prize symbols will appear on a ticket.

C. No duplicate WINNING SYMBOLS play symbols on a ticket.

D. No duplicate non-winning YOUR SYMBOLS play symbols on a ticket.

E. The "GIFT" play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. Tickets that contain the "GIFT" play symbol will have no occurrence of a WINNING SYMBOL play symbol matching any YOUR SYMBOLS play symbols.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

2.3 Procedure for Claiming Prizes.

A. To claim a "HOLIDAY TREASURES" Instant Game prize of $10.00, $20.00, $50.00, $100 or $500 a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOLIDAY TREASURES" Instant Game prize of $1,000, $5,000 or $250,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOLIDAY TREASURES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOLIDAY TREASURES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOLIDAY TREASURES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel

as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,000,000 tickets in the Instant Game No. 755. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 755 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$10	660,000	4.55
$20	360,000	8.33
$50	60,000	50.00
$100	18,750	160.00
$500	3,000	1,000.00
$1,000	175	17,142.86
$5,000	30	100,000.00
$250,000	2	1,500,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 2.72. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 755 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 755, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200604885
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 30, 2006

♦ ♦ ♦

Mason County

Request for Comments and Proposals: Additional Medicaid Beds

Texas Department of Aging and Disability Services (DADS) rule 40 TAC §19.2322(h)(6) permits the county commissioners court of a rural county with a population of less than 100,000 and with no more than two Medicaid-Certified nursing facilities to request that DADS contract for additional Medicaid nursing facility beds in that county. This may be done without regard to the occupancy rate of available beds in the county.

The Mason County Commissioners Court is considering requesting that DADS contract for additional Medicaid nursing facility beds in Mason County. The Commissioners Court is soliciting public input and comments on whether the request should be made. Further, the Commissioners Court seeks proposals from persons interested in providing additional Medicaid beds in Mason County to determine if qualified entities are interested in submitting proposals to provide these additional Medicaid beds in Mason County.

Comments and proposals may be submitted to Judge Jerry Bearden at P.O. Box 1726, Mason, Texas 76856.

A public hearing to receive comments and proposals will be held in the Mason County Courthouse, Commissioners Courtroom, 201 Ft McKavett, Mason, Texas, on September 11, 2006, at 8:00 a.m. For additional information call (325) 347-5556.

TRD-200604899
Jerry Bearden
Judge
Mason County
Filed: August 30, 2006

♦ ♦ ♦

Texas Public Finance Authority

Notices of Public Hearing and Intent to Issue Bonds

Texas Public Finance Authority Charter School Finance Corporation Education Revenue Bonds (Burnham Wood Charter School Project) Series 2006A and Taxable Series 2006B

Notice is hereby given of a public hearing to be held on behalf of the Texas Public Finance Authority Charter School Finance Corporation ("the Corporation") on September 25, 2006 at 12 noon in the Conference Room, Suite 411 at the Texas Public Finance Authority, William P. Clements State Office Building, 300 W. 15th Street, Austin, Texas 78701, with respect to the captioned bond issue (the "Bonds") to be issued in a principal amount not to exceed $9,000,000 by the Corporation. The public hearing will be conducted by Judith Porras, General Counsel of the Texas Public Finance Authority, or her designee (the "Hearing Officer"). Any interested persons unable to attend the hearing may submit their views in writing to the Hearing Officer prior to the date scheduled for the hearing. This notice is published and the hearing is to be held in satisfaction of the requirements of Section 147(f) of the Internal Revenue Code of 1986, as amended.

The proceeds of the Bonds will be loaned to the El Paso Education Initiative Inc., a Texas non-profit corporation d/b/a Burnham Wood Charter School, with campuses located at 7310 Bishop Flores, El Paso, Texas 79912 and 785 Southwestern Drive, El Paso, Texas 79912 (the "School"). The proceeds of the Bonds will be used for the purposes of financing (i) the acquisition of the land and site improvements located at 7310 Bishop Flores, El Paso, Texas 79912, consisting of an approximately 10,000 square foot class room building, and construction of improvements thereon; (ii) the acquisition of the land and site improvements located at 785 Southwestern Drive, El Paso, Texas 79912, consisting of an approximately 27,000 square foot facility on an approximately 4.5 acre site, and construction of improvements thereon; (iii) the acquisition, equipping, improving, renovating and/or remodeling of certain educational facilities of the School, including construction, demolition, design and possible acquisition of adjacent land (collectively, clauses (i), (ii) and (iii) are referred to herein as the "Project"), (iv) funding a debt service reserve fund, and (v) paying the costs of issuance. The initial owner and/or operator of the Project is and will be the El Paso Education Initiative Inc.

Notice is also hereby given that the Corporation intends to adopt a resolution authorizing the issuance of the Bonds in a principal amount not to exceed $9,000,000 by the Corporation at its September 19, 2006 meeting. The Bonds shall mature not later than December 31, 2041. This notice is published in satisfaction of the requirements of §53.36(a) of the Texas Education Code. The exact time and location of the Corporation's meeting shall be published in accordance with Texas law.

All interested persons are invited to attend such pubic hearing and Corporation meeting to express their views with respect to the Project and the Bonds. Questions or requests for additional information may be directed to the Hearing Officer (telephone: (512) 463-5681).

TRD-200604865
Kimberly K. Edwards
Executive Director
Texas Public Finance Authority
Filed: August 29, 2006

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 21, 2006, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority, Project Number 33114 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 33114.

TRD-200604717
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 24, 2006

♦ ♦ ♦

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 25, 2006, for designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of W.T. Services, Inc. for Designation as an Eligible Telecommunications Carrier (ETC). Docket Number 33126.

The Application: The company is requesting ETC designation in order to be eligible to receive federal and state universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs and eligible telecommunications providers for service areas set forth by the commission. W.T. Services, Inc. seeks ETC designation in the exchange of Hereford which is within the service area of AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 28, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33126.

TRD-200604860

Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

♦ ♦ ♦

Notice of Application for Designation as an Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 25, 2006, for designation as an eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of W.T. Services, Inc. for Designation as an Eligible Telecommunications Provider (ETP). Docket Number 33127.

The Application: The company is requesting ETP designation in order to be eligible to receive federal and state universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as eligible telecommunications carriers and ETPs for service areas set forth by the commission. W.T. Services, Inc. seeks ETP designation in the exchange of Hereford which is within the service area of AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 28, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33127.

TRD-200604859
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

♦ ♦ ♦

Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on August 28, 2006, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or about September 8, 2006.

Docket Title and Number: Application of Central Telephone Company of Texas d/b/a Embarq for Approval of LRIC Study for 811 Service for "One Call" Notification Systems Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 33131.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 33131. Written comments or recommendations should be filed no later than forty-five (45) days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 33131.

TRD-200604861
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

♦ ♦ ♦

Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on August 28, 2006, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or about September 8, 2006.

Docket Title and Number: Application of United Telephone Company of Texas, Inc. d/b/a Embarq for Approval of LRIC Study for 811 Service for "One Call" Notification Systems Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 33132.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 33132. Written comments or recommendations should be filed no later than forty-five (45) days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 33132.

TRD-200604862
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

♦ ♦ ♦

Notice of Petition for Waiver of Denial of Request for Additional Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on August 24, 2006, for waiver of denial by the North American Numbering Plan Administration (NANPA) Pooling Administrator (PA) of Cricket Communications' (Cricket) request for additional numbering resources in the Houston, Texas rate center. Cricket requested additional growth blocks for the Houston, Texas rate center.

Docket Title and Number: Petition of Cricket Communications, Inc. for a Number Utilization Waiver of Denial of Numbering Resources by the Pooling Administrator for Additional Numbering Resources, Docket Number 33117.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 13, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33117.

TRD-200604759

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 25, 2006

♦ ♦ ♦

Notice of Petition for Waiver of Denial of Request for Number Block

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on August 24, 2006, for waiver of denial by the North American Numbering Plan Administration (NANPA) Pooling Administrator (PA) of Southwestern Bell Telephone, L.P. d/b/a AT&T Texas' (AT&T) request for additional numbering resources on behalf of its customers, JPS Health Network in the Fort Worth, Texas area.

Docket Title and Number: Request for Waiver of Denial of Numbering Resources-Fort Worth Rate Center. Docket Number 33121.

The Application: AT&T requested additional numbering resources on behalf of its customer, JPS Health Network.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 15, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33121.

TRD-200604858
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

♦ ♦ ♦

Notice of Request for Comments

The Public Utility Commission of Texas (commission) has initiated a proceeding to consider amendments to the Public Utilities Regulatory Policy Act (PURPA) that were enacted in 2005 as a part of the Federal Energy Policy Act. These amendments established new federal ratemaking standards that State regulatory bodies must consider, relating to (1) net metering; (2) time-based pricing, metering, and communications (smart metering); and (3) interconnection standards. The commission is seeking comments from interested persons on several questions relating to the requirement to consider these standards. Project Number 32854, *Consideration of Electric Ratemaking Standards under the Public Utilities Regulatory Policy Act*, has been established for this proceeding. PURPA provides generally that a state regulatory body is not obliged to consider the new standards if the regulatory body or state legislature has adopted or considered an equivalent standard.

The commission requests interested persons to file comments to the following questions:

1. The commission has adopted net-metering rules that require electric utilities to provide net-metering options for customers that operate small qualifying facilities. The commission's initial position is that the existing net-metering rules are more limited than the Federal standard and do not relieve the commission of an obligation to consider the new net-metering standard. The commission seeks comments on whether these rules relieve the commission of the obligation to consider this new standard.

2. The Legislature has adopted advanced-metering provisions for the competitive market but has not addressed time-differentiated rates. The commission's initial position is that the Legislature's adoption of advanced-metering provisions does not relieve the commission of an obligation to consider the new advanced-metering and time-differentiated rate standards. The commission seeks comments on whether these rules relieve the commission of the obligation to consider these new standards.

3. The commission has adopted distributed-generation rules concerning the interconnection of small generators to electric utilities, to implement customers' right to interconnect distributed-generation. The commission's initial position is that the adoption of distributed-generation rules relieves the commission of an obligation to consider the new interconnection standard. The commission seeks comments on whether these rules relieve the commission of the obligation to consider this new standard.

4. House Bill 2129 requires the commission to submit a report to the Legislature on advanced-metering, and it has investigated advanced-metering and time-differentiated pricing in preparing the report and considering the adoption of an advanced-metering rule. The commission's initial position is that its investigation of these issues in connection with the report and the rule relieve the commission of the obligation to investigate these issues any further. The commission seeks comments on whether its prior investigations relieve it of the obligation to investigate these issues any further.

5. If the commission concludes that it has an obligation to consider the adoption of these new federal standards, its initial position is that the appropriate forum to consider them would be rulemaking proceedings. The commission seeks comments on whether rulemaking proceedings are the appropriate forum to consider the new standards.

6. The commission also seeks comments on whether different approaches are required for areas in which retail competition has been introduced and areas in which it has not been introduced. The commission's obligation to consider these standards is based on its status as a state regulatory authority. The commission's authority may differ with respect to the new standards, based on different treatment of electric service providers in State law and commission rules and different statutory authority in competitive and non-competitive areas. The commission seeks comments from interested parties that will help it decide the scope of its consideration of the new standards.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 31 days of the date of publication of this notice. All responses should refer to Project Number 32854. This notice is not a formal notice of proposed rulemaking, but the responses to these questions will assist the commission in deciding whether a formal consideration of these standards is required or determining the appropriate forum for considering them.

Questions concerning this notice should be referred to Christine Wright, Electric Industry Oversight Division, at telephone number (512) 936-7376 or email christine.wright@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200604891
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 30, 2006

♦ ♦ ♦

Notice of Standard Affidavit Form for Use in Annual Certifications by Eligible Telecommunications Providers Attesting to the Proper Use of Texas Universal Service Funds

Notice is given to the public that the Public Utility Commission of Texas (commission) has prescribed a standard affidavit form for use in annual certifications by eligible telecommunications providers (ETP) attesting to the proper use of Texas universal service funds pursuant to PURA §56.030.

Project Title and Number: Annual Compliance Affidavit Attesting to Proper Use of Texas Universal Service Fund Pursuant to PURA §56.030. Project Number 32567.

The Public Utility Commission of Texas (commission) initiated this proceeding pursuant to Public Utility Regulatory Act (PURA) §56.030 and P.U.C. Substantive Rule §26.417. PURA §56.030 requires that on or before September 1 of each year, a telecommunications provider that receives disbursements from the TUSF file with the commission an affidavit certifying that the telecommunications provider complies with the requirements for receiving money from the TUSF and requirements regarding the use of money from TUSF program for which the telecommunications provider receives disbursements. To facilitate the certification process, the commission has prescribed a standard affidavit form.

Under P.U.C. Procedural Rule §22.80, the commission may require the use of a standard form after notice and public comment. Therefore, within 21 days of the publication of this notice, interested persons may submit comments regarding the proposed standard affidavit form to the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326. Persons submitting comments regarding the proposed standard affidavit form should refer to Project Number 32567.

PROJECT NO. 32567

ANNUAL COMPLIANCE AFFIDAVIT ATTESTING TO PROPER USE OF TEXAS UNIVERSAL SERVICE FUND PURSUANT TO PURA § 56.030	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

STATE OF _____

COUNTY OF _____

BEFORE ME, the undersigned authority, on this day personally appeared _____ of _____ (the Company or the cooperative "the Company/Cooperative"), who on his/her oath deposed and said:

1. My name is _____. I am employed by _____ in the position of _____. In this position, I am personally familiar with the Texas Universal Service Fund (TUSF) support received by the Company/Cooperative and how the Company/Cooperative uses these funds.

2. _____ (Name of Company/ Cooperative) was designated as an eligible telecommunications provider by the Public Utility Commission of Texas (Commission) in Docket No. _____ by order dated _____.

3. I certify that I am familiar with the requirements set forth in PURA and the Commission's Substantive Rules for receiving money from the TUSF. Pursuant to

PURA § 56.030, I hereby certify that _____ (the Company/Cooperative) is in compliance with those requirements for receiving money from the TUSF.

4. Pursuant to PURA § 56.030, I hereby certify that _____ (the Company/Cooperative) is in compliance with the requirements set forth in PURA and the Commission's Substantive Rules regarding the use of money from each of the following TUSF programs from which disbursements are received (please check all that apply):

- ☐ **Texas High Cost Universal Service Plan (§ 26.403);**
- ☐ **Small and Rural ILEC Universal Service Plan (§ 26.404);**
- ☐ **Implementation of the PURA §56.025 (§ 26.406);**
- ☐ **Additional Financial Assistance (§ 26.408);**
- ☐ **USF Reimbursement for Certain IntraLATA Services (§ 26.410);**
- ☐ **Lifeline Service and Link Up Service Programs (§ 26.412);**
- ☐ **Telecommunications Relay Service (§ 26.414);**
- ☐ **Designation of Eligible Telecommunications Providers to Provide Service to Uncertificated Areas (§ 26.421);**
- ☐ **Subsequent Petitions for Service in Uncertificated Areas (§ 26.422);**
- ☐ **High Cost Universal Service Plan for Uncertificated Areas where an Eligible Telecommunications Provider (ETP) Volunteers to Provide Basic Local Telecommunications Service (§ 26.423); and**
- ☐ **Other (please specify _____).**

5. The matters addressed above are within my personal knowledge and are true and correct.

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this the _____

day of _____, _____.

_____

Signature of Affiant

_____

Notary Public's Signature

State of _____

SEAL:

TRD-200604890
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 30, 2006

♦ ♦ ♦

Public Notice of Workshop on Demand-Response Programs in the ERCOT Market

The staff of the Public Utility Commission of Texas (commission) will hold workshops on demand response projects on Monday and Tuesday, October 2 and October 3, 2006, at 10:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 32853, *Evaluation of Demand-Response Programs in the Competitive Electric Market*, has been established for this proceeding.

Questions concerning the workshop or this notice should be referred to Shawnee Claiborn-Pinto, Electric Industry Oversight Division, (512) 936-7388. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200604863
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2006

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms for the development of the Regional Mode Split Model for use in travel demand modeling for a 5-county area.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Deputy Director, at (210) 230-6904 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CDT), Friday, September 29, 2006 at the MPO office to:

Jeanne Geiger, Deputy Director

San Antonio-Bexar County MPO

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's Selection Committee. The Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this project, in the amount of $200,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200604663
Felix Escamilla
Office and Grants Manager/HR Generalist
San Antonio-Bexar County Metropolitan Planning Organization
Filed: August 23, 2006

♦ ♦ ♦

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to provide Support for the Metropolitan Transportation Plan Update which includes public involvement and travel demand modeling tasks.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Deputy Director, at (210) 230-6904 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CDT), Friday, September 29, 2006 at the MPO office to:

Jeanne Geiger, Deputy Director

San Antonio-Bexar County MPO

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's Selection Committee. The Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this project, in the amount of $250,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200604664
Felix Escamilla
Office and Grants Manager/HR Generalist
San Antonio-Bexar County Metropolitan Planning Organization
Filed: August 23, 2006

♦ ♦ ♦

Stephen F. Austin State University

Notice of Consultant Contract Amendment

Stephen F. Austin State University, Nacogdoches, Texas, has amended a contract for web shell coordinating and programming services for the University Web site redesign with The Kerry Company, 1101 30th Street NW, Washington, DC 20007. The Notice of Award for the original contract was filed in the September 2, 2005, issue of the *Texas Register* (30 TexReg 5099). The first contract amendment was filed in the April 21, 2006, issue of the *Texas Register* (31 TexReg 3117) for the amount of $10,000. The second contract amendment was signed on August 5, 2006, for the amount of $19,460.00.

No documents, films, recording, or reports of intangible results will be required to be presented by the outside consultant.

For further information, please call (936) 468-4101.

TRD-200604764
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 25, 2006

♦ ♦ ♦

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of consultant contract award. The consultant will design and implement a RFID property tracking system as requested. The Notice of Availability was filed in the July 28, 2006, issue of the *Texas Register* (31 TexReg 6145).

The contract was awarded to Maren Systems, LLC, 14101 Highway 290 West, Suite 500A, Austin, TX 78737, for an amount not to exceed $48,000.00.

The beginning date of the contract is August 25, 2006 and the ending date is October 25, 2006.

Documents, films, recording, or reports of intangible results will not be presented by the outside consultant.

For further information, please call (936) 468-4157.

TRD-200604772
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 25, 2006

♦ ♦ ♦

Notice of Consultant Contract Renewal

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of renewal of the University's contract with consultant Charles H. Warlick, Ph.D, 4306 Oak Creek Dr., Nacogdoches, TX 75965. The original contract was in the sum of $20,720 plus expenses. The first renewal was published in the August 27, 2004, issue of the *Texas Register* (29 TexReg 8183). The second renewal was published in the July 1, 2005, issue of the *Texas Register* (30 TexReg 3767). The contract will be renewed beginning September 1, 2006 and continuing through August 31, 2007, with a total amount not to exceed $10,000.

No documents, films, recording, or reports of intangible results will be required to be presented by the outside consultant.

For further information, please call David Justus at (936) 468-4101.

TRD-200604767
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 25, 2006

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).